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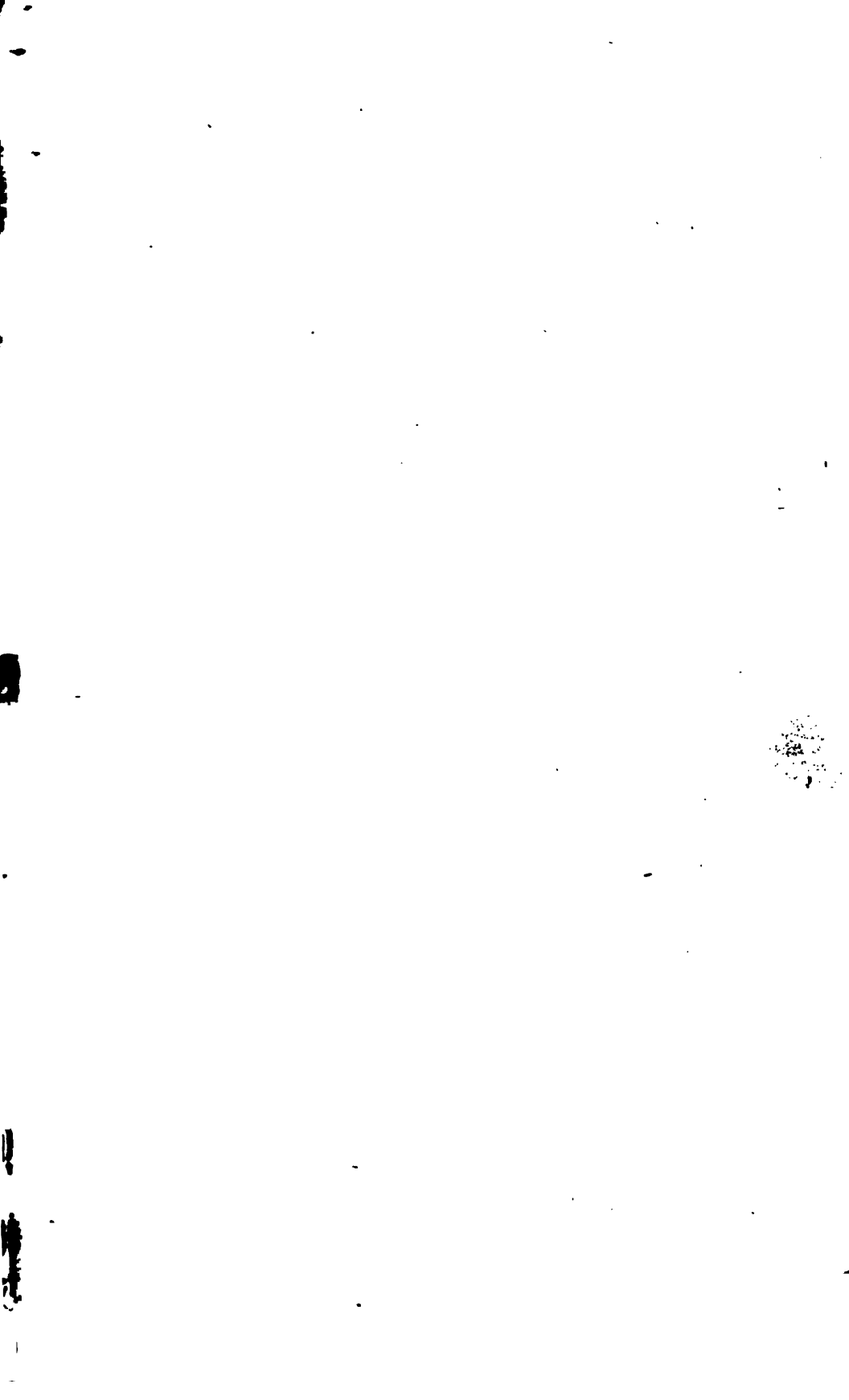
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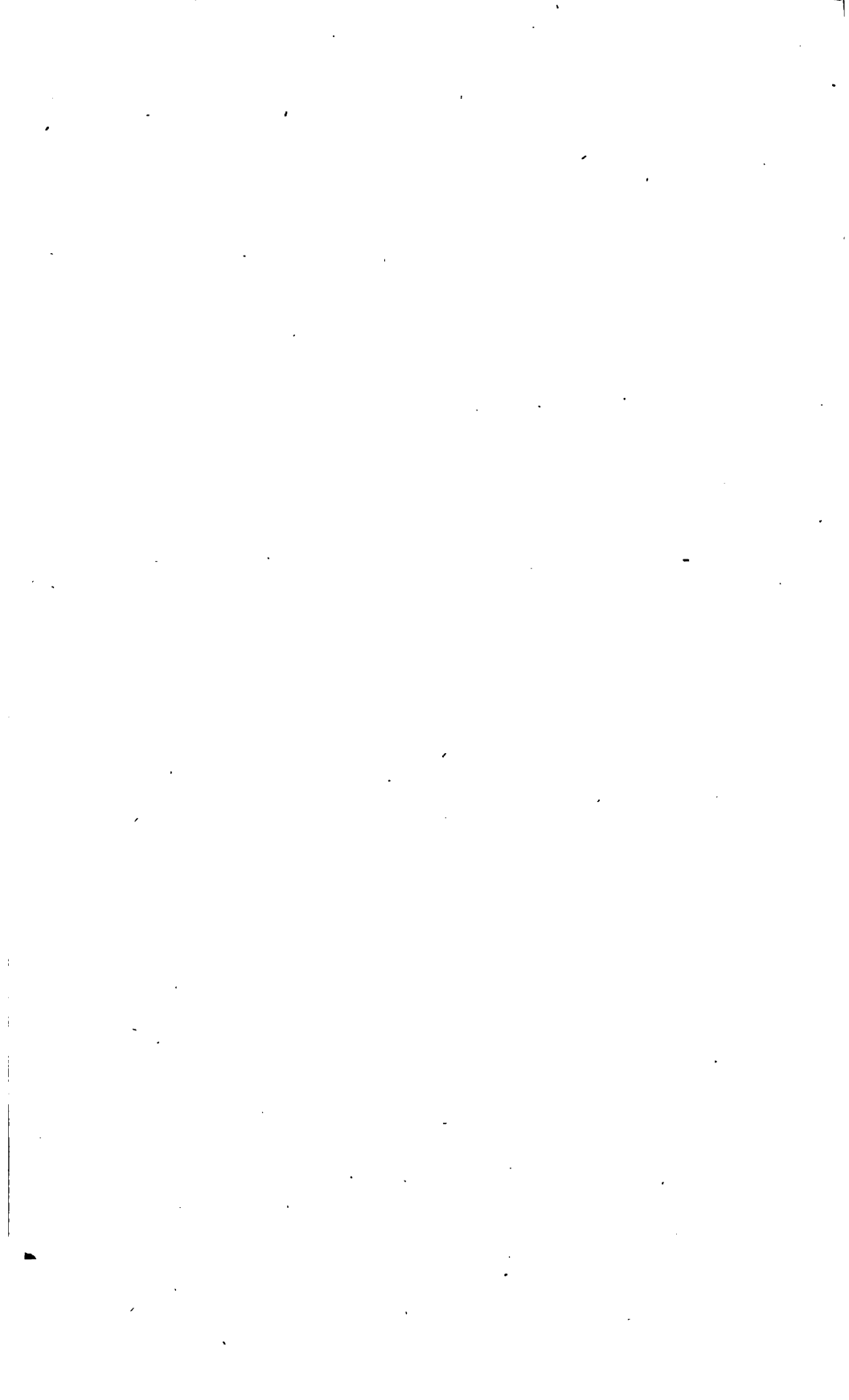
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A
TREATISE
ON
THE LAW OF
VENDORS AND PURCHASERS
OF
Personal Property ;

CONSIDERED
CHIEFLY WITH A VIEW TO MERCANTILE TRANSACTIONS.

By **GEORGE ROSS, Esq.**
OF THE INNER TEMPLE, BARRISTER AT LAW.

THE SECOND EDITION,
WITH CONSIDERABLE ADDITIONS,
AND THE
CASES AND STATUTES BROUGHT DOWN TO THE PRESENT TIME.

By **S. B. HARRISON, Esq.**
OF THE MIDDLE TEMPLE.

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PREFACE

TO THE SECOND EDITION.

THIS edition has been carefully revised, and contains the cases and statutes relating to the subject, brought down to the present time; besides several notes upon points about which nothing is said in the original work, but which are of importance both in a commercial and practical point of view.

It will be proper to remark, that such part of the third section of the fourth chapter as relates to the *sale of ships* has been wholly re-compiled, in consequence of the most material alteration made in that branch of the law, by the recent consolidated ships' registry acts; and that a new section, (which is the fourth,) has been added to that chapter, upon the subject of sales by auction.

S. B. H.

3. ESSEX COURT, TEMPLE.

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PREFACE

TO THE FIRST EDITION.

WHETHER the numerous publications on the various branches of the law of England, which have of late years been submitted to the public, be, or be not, a real benefit to the profession, is a question upon which much difference of opinion has prevailed. It is contended, (and certainly with some appearance of plausibility,) that the desultory reading of unconnected treatises on legal subjects, from which a sort of practical knowledge may be prematurely obtained, has an obvious tendency to disincline the student to that "tedious and lonely process of extracting the theory of law from a mass of undigested learning," by which alone he can hope to acquire those elements and first principles, which are the only solid foundation upon which to build the fair fabric of professional eminence; and that (as the elegant commentator upon our laws has said, upon another occasion,) "being uninstructed in the principle upon which

the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend any arguments drawn *a priori* from the spirit of the laws, and the natural foundations of justice.* If, indeed, such were the necessary effects of the class of works alluded to, they would be deservedly reprobated; but if we consider them as mere digests of that ancient lore, whose almost chaotic confusion is so appalling to the novice, and which “marshal him the way he should go” in his more recondite researches, we must pause before we give our assent to that sort of reasoning, which supposes that the student who sets out in his career so guided, will necessarily miss the goal, or that he will be so captivated with the bland beauties of a modern margin, that he will never dive into the sombre regions of black letter, where, cob-web bound, the truths of law lie hid.

Without, however, presuming to give any decided opinion upon this question, this much I will say,—that if there be any who, having skimmed the surface of the legal science, stop short in their course of study, such I am inclined to think, without the aid of those proscribed

* 1 Blac. Com. 32.

treatises, would never have acquired even that superficial knowledge, which may perhaps be sufficient to qualify them for the more ordinary business of the bar. But whatever weight the objections I have stated may have, when applied to treatises upon the more abstruse branches of the law, I apprehend it cannot be urged with much force against works of a mere practical nature, whose object is not so much to benefit the student as to assist the practising lawyer, and direct the merchant in the formation of his contracts; at any rate, I shall assume the demand for works of this nature as the best evidence of their utility.

Taking it then for granted, that it is no trifling assistance to the lawyer to have the law upon any subject of frequent recurrence digested into such a form, that he can readily refer to it in the hurry of business, it appears rather remarkable that whilst there is scarcely a title in our laws which has not been made the subject of a distinct work, the law which regulates the transfer of all the commercial wealth in the country should hitherto have remained unnoticed. As the contract of sale is perhaps as productive of litigation as any one transaction that comes under the review of the courts of law, a compendium of the law upon that subject seemed to be a desideratum: I conceived, therefore, that I should be employing

my leisure hours advantageously to myself, and, I trust, not without some benefit to the profession of which I have the honour to be a member, in collecting and arranging the law on this most important subject. In the execution of this undertaking I have endeavoured to draw from every source, ancient and modern, whatever appeared to me to elucidate the contract under consideration; but, notwithstanding my utmost vigilance, I am far from presuming to think that much valuable information may not have escaped me. Whenever I have observed a striking coincidence between the law of England and the civil law I have noted it, and not unfrequently cited passages from the Institutes, Digest, &c. by way of illustration, or to mark the origin whence our own law has been derived.

The arrangement of the subject which I have adopted, will be best explained by the table of contents; but to compensate for any deficiency of arrangement, and to facilitate the reader's search for any particular point, (upon which facility the value of a work of this nature must greatly depend,) I have added a copious index of the principal matters.

I am afraid that I shall be thought by many to have cited the cases rather more at length than was necessary; but my apology for that is, that

in a work not written exclusively for the professional reader, it was a principal object to make it as perfect as possible within itself; and my object of general utility would be in a great measure defeated, were it necessary to refer to the Reports to form a correct apprehension of the cases. Though the adoption of this plan may have, in a slight degree, increased the bulk of the book, it may not be altogether useless, even to the professional reader, on the circuit, or where the reports may not be at hand.

It is an observation which will not fail to have suggested itself to every one who has attentively observed the proceedings of our courts of justice, *that by far the greater part of the law-suits which have their rise in mercantile transactions originate, not so much in want of candour and good faith, amongst our merchants, as in a misconception or ignorance of the law which regulates even the most common contracts*; the perpetual recurrence of which, and the hurry in which they are entered into, frequently preclude the parties from having recourse to professional advice. If my humble endeavours shall be found in any degree to remedy this radical mischief, and to diffuse a more general knowledge of the law of sales, and thereby lessen that litigation which is contrary to the characteristic spirit of a British merchant, that most gratifying of all feelings, an honest

pride of having served the cause of truth and justice, will greatly overpay me for the labour I have bestowed on the work which I now submit to the judgment of my own profession and the mercantile world. I may, in truth, say with our master, Coke, "*Ex quibus laboribus se quidem respub. emolumentum lector studiorum suorum condignum fructum perceperit, existimabo me elucubrationum mearum amplum sanè præmium consequutum.*" *

G. R.

* Pref. to the 3d. Rep.

4. Inner Temple Lane,
July 20. 1811.

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THE
LAW
OF
VENDORS AND PURCHASERS,
&c. &c.

CHAPTER I.

OF SALES IN GENERAL.

A SALE may be defined to be, "A transmutation of property from one man to another, in consideration of some price or recompense in value."¹ Hence it appears that this contract belongs to that class of contracts, which the civil law calls *DO UT DES*.² It is a transmutation of property; for upon all sales of goods in possession the property is changed immediately upon the making of the contract³; although the actual possession may not be obtained by the vendee until the fulfilment of the stipulated terms⁴; thus, if a man sell his horse for money, though he may keep him until he is paid, yet the property of the horse is by the bargain in

¹ 2 Blac. Com. 446.

² Fl. l. 19. tit. 5. 5.

³ Com. Dig. tit. Biens, D. 5.

⁴ Perk. § 92.

the bargainor or buyer ; so that if he presently tender the money to the seller and he refuse it, he may take the horse, or have an action of detainment. And if the horse die in the vendor's stable, between the bargain and delivery, still he may have an action of debt for the money, because by the bargain the property was in the buyer.¹ But when there is no actual change of possession, it is necessary, in order to render the bargain binding, that something should be paid down or tendered to the vendor at the time of making the bargain, by way of earnest ; as if the bargain be that one man shall give ten pounds for the horse of another, and give one penny in earnest, which is accepted, this is a perfect bargain, and they shall have mutual remedies for the recovery, the one of the horse, and the other of the price.² So if a man say that the price of his cow is four pounds, and another say he will give him four pounds, but does not pay it presently, he may not have her afterwards except the owner will, for it is no contract ; but if the purchaser presently go to telling his money, if the owner sell the cow to another, the vendee shall have his action on the case against the vendor.³ So that where either the thing sold is delivered or tendered, or the price or part of it paid or tendered, the property of the goods is bound by the bargain ; and this was the law in very early times, as we learn from Glanville, who, speaking of sales, says, "*Perficitur autem emptio et venditio cum affectu, ex quo de pretio inter contrahentes convenit ; ita tamen quod secuta fuerit rei emptæ et venditæ traditio, vel quod pretium fuerit*

¹ Noy's Max. c. 42. recognized in *Hinde v. Whitehouse*, 7 East, 571.

² Bracton, l. 2. c. 27. Noy's Max.

c. 42. Kitch. 181. a. *Bach v. Owen*, 5 T. R. 409.

³ Kitch. 181. a. 14 H. 8. 20. a. Noy's Max. c. 42.

*solutum totum sive pars, vel saltem quod arrhæ inde fuerint datæ et receptæ*¹ ;” and Bracton looks upon the payment of earnest as evidence of the bargain: “*Emptio vero et venditio contrahitur cum de pretio convenerit inter contrahentes, dum tamen a venditore arrarum nomine receptum fuerit, quia quod arrarum nomine datum est, argumentum est emptionis et venditionis contractæ.*”² In this our law coincides with the civil law.³ But although the property is bound by the bargain, yet where only a part of the money is paid by way of earnest, the property does not seem to be absolutely bound; for if the party giving earnest afterwards neglect to complete his contract, within a reasonable time after request made to him for that purpose, the bargain is dissolved; otherwise this manifest injustice would ensue, that a man by paying a penny earnest might be entitled to take the goods of another, who would be driven to his action to recover the price. And in the case put by Noy, where it is said that on payment of earnest the bargain is perfect, and the parties shall have mutual remedies, &c., he must be understood with this restriction, that the party demanding the horse, tenders at the same time the price.⁴ The law on this subject is clearly stated by Lord Holt, in *Langfort v. the Administratrix of Tyler*.⁵ His Lordship there lays down the following rules: “That, notwithstanding the earnest, the money must be paid upon fetching away the goods, where no time for payment is appointed. That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void. That after earnest given, the ven-

¹ 1. 20. c. 14.² 1. 2. c. 27.³ Inst. 1. 3. tit. 24.⁴ *Cowper v. Andrews*, Hob. 41.⁵ 1 Salk. 113.

dor cannot sell the goods to another without a default in the vendee; and, therefore, if the vendee does not come and pay and take away the goods, the vendor ought to go and request him; and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." (a). It will be observed, that Lord Holt says, "when no other time for payment is appointed;" for if the parties enter into any special contract or agreement, these rules of course will not apply, "*quippe generaliter verum est quod conventio legem vincit.*" Upon these grounds, and with these restrictions, a sale may be defined, a *transmutation of property*.

It is also a transmutation of property in consideration of some price or recompense in value; for in all bargains, sales, contracts, promises, and agreements, there must be a *quid pro quo* presently, except day be given for the payment.¹ This recompense in value, in the contract of *sale*, is always in money; for if it be in a commutation of goods for goods, it is more properly an *exchange*.² It is, then, a transfer of goods for money, which is strictly a sale. Puffendorf explains buying and selling to be a contract, whereby the property of a thing, or some right equivalent to it, is acquired for a

¹ 17 Ed. IV. 2. Co. Lit. 47. b. Dyer, 336. b. (34.) Noy's Max. c. 42.

² 2 Blac. Com. 446.

(a) It has since been ruled at Nisi Prius, by Lord Ellenborough, that the neglect of the buyer to remove the goods in a reasonable time after request will *not* entitle the vendor to resell, although it will give him a right to warehouse-rent, or to an action for not removing them if he be prejudiced by the delay. *Greaves v. Ashkin*, 3 Campb. 426.

certain sum of money.¹ So, too, the civil law: "*Item pretium numerata pecunia consistere debet.*"²

The practice of buying and selling seems to have been substituted in very early times for the primitive method of commutation by barter, though the latter method is still practised in many barbarous nations, where the use of money, as a common medium, is unknown. One of the most early sales we meet with in history is related in the book of Genesis, on the transfer of the field of Machpelah from Ephron the Hittite to Abraham, where it is said that Ephron agreed to give the field, and Abraham to give *money* for it. Ephron then declared the price to be four hundred shekels of silver, "and Abraham weighed to Ephron the silver which he had named, in the audience of the sons of Heth, four hundred shekels of silver—current money with the merchant."³ We have another instance of a sale in the same sacred book; the sale of corn in Egypt to the brethren of Joseph; where we are told that "Joseph commanded to fill their sacks with corn, and to restore every man's money in his sack."⁴ We might also refer to the sale of Joseph to the Ishmaelites for twenty pieces of silver, as a further proof of the antiquity of sales for money.

Having thus amplified the definition with which we set out, and shortly adverted to those requisites to the perfection of the contract of sale, which subsisted at common law, it will now be necessary to point out the additional, or rather alternative requisites, which have been imposed by statute.

¹ J. N. l. 5. c. 6. § 2.

² Inst. l. 3. tit. 24.; and see also Fe. l. 25. tit. 1.

³ Genesis, xxiii. 11. *et seq.*

⁴ Ibid. xxiv.

As man in a state of society is liable to many wants, real or imaginary, which his own individual exertions would be insufficient to supply, the interest of mankind at large has suggested the communication of benefits, which enables each to contribute to the comforts of all, through the medium of contracts. As much, therefore, of the happiness of its subjects must necessarily depend upon the strict observance of such contracts, it becomes one of the first, and most important, duties of a good government, to provide by law for their due performance. Accordingly, we find in almost all nations certain formalities have been established, as necessary to the creation of a binding contract between man and man, in order to give to it that notoriety which is the most effectual mean of insuring its due performance: thus amongst the Jews, "it was the manner to confirm all things, for a man to pluck off his shoe, and give it to his neighbour, and this was a testimony in Israel."¹ And in this manner we read of the contract of sale between Boaz and Elimelech being testified.² Stiernhook³ informs us, that amongst the ruder nations of the north, the more simple custom of shaking hands was the only ceremony in use to confirm a bargain. But though these ceremonies, or the giving of earnest, might be found quite sufficient in those early times, for the evidencing of bargains, we invariably find that where civilisation has made any progress, and brought with it its attendant wants, which would naturally induce a more extensive commercial intercourse, some more permanent and authentic record of contracts of sale, than the mere memory of the by-standers, has been thought necessary. Hence, in more modern times, we find that contracts of

¹ Ruth, iv. 7.

² Ibid. iv. 8, 9.

³ De jure, Goth, b. 2. c. 5.

this nature were frequently reduced to writing. This practice is recognised both by the Roman law¹ and by the law of England², particularly since the passing of the statute 29 Car. II. c. 3. (commonly called the statute of frauds); which statute is supposed to have been penned by that distinguished judge, Sir Matthew Hale, with the assistance of some of the most eminent lawyers of his time³: but by whatever hand this salutary statute was drawn, the beneficial effects which it has produced, justly entitle it to the emphatic eulogy pronounced upon it by the late Lord Ellenborough, who called it "one of the wisest laws in our statute book."⁴

This statute, which is stated to be made "for the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury," enacts, "*That no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note, or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.*"⁵

In the elucidation of this branch of the statute, the first inquiry which presents itself is, what contracts for the sale of goods, &c., are within the meaning of the act? Upon this point, it has been determined that the words "no contract, &c.," extend to executory con-

¹ Inst. l. 3. tit. 24. Ff. l. 22. tit. 4.

² Bracton, l. 2. c. 27.

³ North's Life of Lord Keeper

Guildford, 109. Lord Ellenborough in *Wain v. Warblers*, 5 East, 17.

⁴ In *Chaplin v. Rogers*, 1 East, 194.

⁵ 29 Car. II. c. 3. § 17.

tracts, as well as to such as are to be completed immediately, *i. e.* where the contract is merely for the sale of goods, &c., *having a present existence in the shape in which they are to be delivered, at the time of making the bargain*: such contracts, therefore, are void, unless the requisites of the statute have been complied with. Thus, where A. and B.¹ entered into a verbal agreement for the sale of goods for more than ten pounds, to be delivered at a future time, and no earnest was paid, nor was any part of the goods delivered, or any note or memorandum in writing signed, the court were of opinion that this contract was within the statute, and consequently void.

So, where the defendant at Nottingham² sold, to the plaintiff, by sample, 50 quarters of wheat, at four guineas per quarter, to be delivered to the defendant at Gainsborough. Two days afterwards, the defendant delivered to the plaintiff at Nottingham the sample by which he had sold the wheat to him: *but such sample was no part of the 50 quarters to be delivered at Gainsborough.* No money was paid by the plaintiff to the defendant on account of the wheat; nor was there any memorandum in writing signed by the parties. This contract was held void by the statute; and Lord Kenyon C. J., in delivering his opinion, said, that “after this question had been afloat so long in the courts, he was glad that by the very able decision of the Court of Common Pleas in the case of *Rondeau v. Wyatt* the construction of this clause in the statute of frauds was brought back to the manifest intention of the legislature in making that provision.”

¹ *Rondeau v. Wyatt*, 2 H. Black. 63.
³ Bro. C.C. 154. S.C.

² *Cooper v. Elston*, 7 T.R. 14.

Also, where it appeared that the plaintiff¹ had verbally agreed to buy certain sheep of the defendant at Lewes fair, and to take them away at a certain hour, but no money was paid, nor any sheep delivered, the plaintiff not coming at the appointed time, nor sending to take the sheep, the defendant sold them to another person. The court held, that the statute of frauds prevented any property from vesting in the plaintiff, there being neither earnest, delivery, nor agreement in writing. But Wilson J. observed, that where a sale is not immediate, it is not within the statute of frauds, an opinion which he adhered to, though contrary to the opinion of the rest of the court, in the before-mentioned case of *Rondeau v. Wyatt*.

But where the contract is for the sale of that which has only a prospective existence, in the specific shape contracted for, and is not *in esse*, and capable of an immediate delivery at the time of the bargain, the case is out of the statute, as may be seen by the following decisions.

The defendant bespoke a chariot,² and when it was made, refused to take it; and in an action for the value, it was objected, that they should prove something given in earnest, or a note in writing, since there was no delivery of any part of the goods. But Pratt C. J. ruled that this was not a case within the statute of frauds, which relates only to contracts for the actual sale of goods, *where the buyer is immediately answerable, without time given him by a special agreement, and the seller is to deliver the goods immediately.*

¹ *Alexander v. Comber*, 1 H. Black. 20.

² *Towers v. Osborne*, 1 Str. 506.

Upon this case it ought to be observed, that the latter part of the decision must be understood as explained by the case of *Cooper v. Elston*¹, where Grose J. says, "The case of *Towers v. Osborne* went upon the general principle, that executory contracts were not within the meaning of the statute. If by that were meant contracts for the sale of goods to be executed on a future day, such a construction would be a repeal of the act; but if it only meant such contracts as were incapable of being executed at the time, then the decision was right;" and Lawrence J. in the same case says, "The case of *Towers v. Osborne*, when truly considered, was not a contract for the purchase of goods, but for the making of something which had no existence at the time." — This distinction is farther enforced by Lord Loughborough in pronouncing the judgment of the court in *Rondeau v. Wyatt*²: His Lordship's observation is, that "the case of *Towers v. Osborne* was clearly out of the statute, not because it was an executory contract, but because it was for work and labour to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone, the statute is applicable."

Where the defendant agreed³ to deliver one load and a half of wheat to the plaintiff, within three weeks or a month from the said agreement, at the rate of twelve guineas a load, to be paid on delivery; which wheat was understood by both parties to be at that time unthrashed. No part of the said wheat was delivered, nor any money paid by way of earnest for the

¹ 7 T.R. 14.

² 2 H. Black. 63.

³ *Clayton v. Andrews*, 4 Burr. 2101.

same, nor any memorandum made in writing. This contract was held not to be within the statute (b); and it was observed by Yates J. "That the wheat was unthrashed at the time when the contract was made; therefore it *could not be delivered at that time.*" It was not capable of delivery as wheat. As to the subject-matter of contracts within the provision of this clause, it has been determined, that it relates *only to goods, wares, and merchandises in esse*, and capable of delivery at the time at which the bargain was made¹; with reference to which time the subject-matter must be taken²; and therefore a crop of grass being at the time of the bargain for the sale of it, an unsevered portion of the freehold, cannot be considered as goods, wares, and merchandises, so as to bring a contract for the sale thereof, within this section of the statute of frauds.³

The next consideration in the construction of this clause is, what is a sufficient acceptance by the buyer

¹ *Turners v. Osborne*, 1 Str. 506.
Clayton v. Andrews, 4 Burr. 2101.

² Lord Ellenborough in *Crosby v.*

Wardsworth, 6 East, 610. *Waddington v. Bristow*, 2 B. & P. 452.

³ *Crosby v. Wardsworth*, *supra*.
Emmerson v. Heelis, 2 Taunt. 58.

(b) And a contract for the purchase of a quantity of oak pins, for the price of upwards of 10*l.*, which were not then made, but were to be cut out of slabs and delivered to the buyer, was held, in a recent case, not to be within the statute. *Groves v. Buck*, 3 M. & S. 178. But a verbal contract for the purchase of flour, which at the time only existed as unground wheat, and so was not capable of immediate delivery, was held to be a contract within the statute, *Garbutt v. Watson*, 5 B. & A. 613. And where an additional price was agreed to be paid for barley, on account of the seller undertaking to deliver it to the buyer at a considerable distance from the place of sale, but no separate charge was made for carriage, the case was decided to be within the statute. *Astley v. Emery*, 4 M. & S. 262.

of part of the goods sold? It would seem that an actual delivery by the seller, and acceptance by the buyer, is not necessary in all cases, as where the goods are ponderous, and incapable of being handed over from one to another, a symbolical delivery, such as delivery of the key of a warehouse in which the goods are lodged, or the like, is sufficient to satisfy the statute.¹

So also a constructive delivery may arise from the terms of the contract itself, without any distinct substantive act of the buyer; as where the plaintiff, who kept a livery-stable, and dealt in horses, being in treaty with the defendant for the sale of two horses, demanded one hundred and eighty guineas for them, the defendant offered a less price, which was rejected: at length he sent word that "the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff, upon this, removed them *out of his sale stable into another stable*. It was objected, that this was not such a constructive delivery as would avail, to take the case out of the statute. But the court held the delivery to be sufficient (c), and the plaintiff recovered the price of the horses in an action for goods sold and delivered.²

¹ *Chapin v. Rogers*, 1 East, 194.

² *Elmore v. Stone*, 1 Taunt. 458.

(c) But in a recent case, where the defendant by verbal contract purchased a horse, at a price to include firing, blistering, and keeping until fit to send to grass, which 22 days after was sent by the defendant's directions to graze at K., but was there entered in plaintiff's name by defendant's desire, and no time was specified for payment, it was held, that there was not a sufficient acceptance within the statute, because there was no change of possession, which distinguished the case from that of *Elmore v. Stone*.

The delivery of an order to a wharfinger, or warehouseman, in whose custody the goods are, to deliver them to the vendee, is sufficient to satisfy the statute¹, and whether a transfer is in consequence made in the wharfinger's books or not.^{2(a)}

So it seems if the goods remain in the hands of the vendor, and he receives warehouse-rent for them, this is tantamount to a delivery to the purchaser.

Thus³, the defendants, who were warehousemen, sold a quantity of oil, then lying in their warehouses, to J. S.,

¹ *Searle v. Keaves*, 2 Esp. 598.

³ *Hurry v. Manglee*, 1 Campb. 462.

² *Harman v. Anderson*, 2 Campb. 245.

Carter v. Toussaint, 5 B. & A. 855. And again, where the defendant had verbally agreed with an agent of the plaintiff, for the purchase of twelve bushels of tares, to remain in the vendor's possession until called for, and the agent on his return home measured the twelve bushels and set them apart for the purchaser, the court held, that this did not amount to an acceptance, and doubting the authority of the case of *Elmore v. Stone*, distinguished it from that case, because there, an expense had been incurred by the seller on account of the buyer, and by his direction, which might be considered as evidence of an acceptance. *Howe v. Palmer*, 3 B. & A. 321.

(d) But where a hogshead of wine, in the warehouse of the London Dock Company, was sold, and a delivery-order given to the vendee, but there was no contract in writing, it was held, that the acceptance of the delivery-order by the vendee, was not an actual acceptance within the statute, upon the ground that the Company still held the wine as the agents of the vendor, and had not accepted the delivery-order. *Bentall v. Burn*, 3 B. & C. 423.

The shipping of goods in the same manner as in previous dealings between the parties, is an acceptance and actual receipt by the purchaser within the statute. *Hart v. Sattley*, 3 Campb. 528. But a delivery to an agent, who is merely authorised to receive the goods, and not to judge of their quantity or quality, so as to render the contract conclusive, is not a sufficient delivery to satisfy the statute; for there can be no actual acceptance of the goods, so long as the buyer continues to have a right to object to them upon either of those grounds. *Hanson v. Armitage*, 5 B. & A. 557.

to be paid for by his acceptance at six months. J. S. having given his acceptance accordingly, on the 1st of August following, sold the oil to the plaintiff, who purchased it *bonâ fide*, and paid for it at the rate agreed on.

The oil, which still remained in the defendant's possession, was demanded of them by the plaintiff about the end of October, when they said that J. S. had become insolvent before his acceptance was due, and that they would not deliver up the oil until they were paid for it. Their clerk denied that they had ever transferred the oil in their books to the account of J. S. : but it appeared that they had received warehouse-rent from him, for its remaining in their warehouse after the period when it ought to have been taken away, according to the terms of the sale. It was ruled by Lord Ellenborough C. J., *That the acceptance of warehouse-rent was a complete transfer of the goods to the purchaser.* "If I pay," said His Lordship, "for part of a warehouse, so much of it is mine." — "This is an executed delivery by the seller to the buyer." — "The goods were transferred to the person who paid the rent, *as much as if they were removed to his own warehouse, and there deposited under lock and key.*"

It has also been decided, that if a purchaser, with the privity and approbation of the vendor, exercise any act of ownership over the goods sold, this is sufficient evidence of a delivery, though the local situation of the goods is not changed (*e*), as will appear from the following cases.

(*e*) But where a party agreed to purchase a horse for ready money, and to take him away within a time agreed upon, and about that time rode the horse, and gave directions as to his treatment, but requested

After¹ a bargain and sale of a stack of hay between the parties on the spot, it appeared that the vendee had resold, and that the second vendee (although without the knowledge and against the approbation of the original vendee) had taken away part of the hay; it was held, that this was sufficient evidence of a delivery to, and acceptance by, the first vendee.

So, if a purchaser write his name or initials upon a particular article bought, it is sufficient evidence of a delivery and acceptance of the article so bought.² (f)

¹ *Chaplin v. Rogers*, 1 East, 191.

Anderson v. Scott, ib. 255.; and see

² *Hodgson v. Le Bret*, 1 Campb. 233.

Skinner, 647.

that it might remain in the seller's possession for a further time, at the expiration of which he promised to fetch him away, and pay the price, to which the seller assented; the horse having died before he was taken away, or the price paid, it was held not to be an acceptance within the statute. *Tempest v. Fitzgerald*, 3 B. & A. 680. And where goods were made to order, and remained in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter took away, it was held, that there was no acceptance of the residue of the goods within the seventeenth section of the statute. *Thompson v. Maceroni*, 3 B. & C. 1.

(f) In one case, where several pieces of goods were bought at the same time, but at separate prices, and the purchaser wrote her name upon one of the pieces, for the purpose of denoting that she had bought it, such writing was held to be a sufficient delivery under the statute, of the piece which was marked, but not of the others. *Hodgson v. Le Bret*, 1 Campb. 233. And in another case, upon a sale of wine, where the vendor's clerk cut off the spills from the casks, and marked them with the purchaser's initials, in the presence of both parties, and the purchaser took the gauge-numbers, Lord Ellenborough held, that although the delivery was not completed so as to bar an action for the non-delivery, yet that what had passed, amounted to an incipient delivery, sufficient to take the case out of the statute. *Anderson v. Scott*, 1 Campb. 235. n. But where a party purchased several distinct articles, and by a separate bargain as to each, and some were severed from the bulk and marked by him, it was held that the

Or if a sample¹ is delivered to, and accepted by the purchaser, or his agent, if such sample form part of the article sold, this will take the case out of the statute (g); or if the goods be weighed for the purpose of delivery, though put into another vessel than that which the vendee desired.

But to bring a case within the exceptions of the statute by the acceptance of part of the goods sold, it must be an ultimate acceptance in affirmance, and with a view to the performance of the contract; for where a plaintiff, under a verbal order, had sent to the defendant a bale of sponge, which the defendant considered to be inferior in quality to that ordered, and consequently returned it, and soon after wrote a letter to the plaintiff, stating, that he had examined the sponge, and finding, that it was not worth more than six shillings per pound, he had sent it back. It was held, that this letter was no evidence of an acceptance of the goods by the defendant, so as to take the case out of the statute.²

As to what shall be a sufficient earnest to bind the bargain, I do not find any decision. (h)

¹ *Hinde v. Whitehouse*, 7 East, 558.
Klinitz v. Surry, 5 Esp. 267. *Talver*
v. West, Holt, 178.

² *Simon v. McIntier*, 1 W. Black.
 600.

³ *Kent v. Huskinson*, 3 B. & P. 235.

whole purchase was one entire contract, and being above 10*l.* was within the statute, and that there was no sufficient transfer and acceptance to bring it within the exception. *Balday v. Parker*, 2 B & C. 37.

(g) But if the sample form no part of the bulk of the goods sold, it will not be a part delivery within the statute. *Cooper v. Elston*, 7 T.R. 14.

(h) It has since been decided, that the sum given as earnest must be a real payment, and not a fictitious ceremony; for in a question on

Mr. Justice Blackstone¹, speaking of the contract of sale, says, "But if any part of the price is paid down, if it is but a penny, or any portion of the goods delivered by way of earnest, the property is bound, &c.;" from which passage it may be inferred, that it was the opinion of that learned Judge, that earnest is a part-performance of the contract on one part or other; but it may be observed, that the statute under consideration speaks of a partial delivery of the goods, or the giving of *something* in earnest, or in part of payment, as distinct and substantive acts, in which the makers of this statute seem to have followed Glanville², whose words are, "*Ita tamen quod secuta fuerit rei emptæ et venditæ traditio, vel quod partem fuerit solutum totum sive pars, vel saltem quod arrhæ inde fuerint datæ et receptæ.*" In the case of a bargain bound by earnest, put by Noy³, it is said, "And you do give me a penny in earnest;" a penny is here mentioned only as an instance, but it is presumed that a ring, a glove, or (as we may remember was the custom of the Jews) a shoe given in earnest of a bargain, and so expressed at the time, would be equally binding; earnest seems to be more a pledge than a payment, and where *money* is given in earnest, it might, perhaps, more appositely be considered as part-payment: earnest is divided by the

¹ 2 Blac. Com. 447.² Max. c. 42.³ L. 10. c. 14.

the purchase of a horse, it was held that the production of a shilling by the purchaser, and drawing it over the hand of the seller's servant, and then returning it into his own pocket (which is a ceremony used in the north of England, and called striking off a bargain), is not a part payment sufficient to take the case out of the statute. *Blenkin-son v. Clayton*, 7 Taunt. 597.

civilians into two kinds, symbolical and pecuniary, as we learn from Vinnius.¹ “*Datur autem arrha vel simpliciter, ut sit argumentum duntaxat, et probatio emptio- nis contractæ, veluti si annulus detur; vel ut simul postea cedat in partem pretii data certa pecunia. Cum arrha tantum ut symbolum data est, impleta emptione; id est, re tradita et pretio, numerato, restituenda est emptori, cum in certa pecunia, cedit in defalcationem pretii, nihilque repetitur; sed reliqua pecunia re tradita exsolvenda est.*”

We next come to consider, what is a sufficient note or memorandum in writing, of a contract for the sale of goods above the value of ten pounds. Upon this point it has been held, that a memorandum signed by the party sought to be charged with the contract, or his agent, takes the case out of the 17th section of the statute of frauds, though not signed by the other party, as appears by the following cases: (i)

¹ Comment. in Inst. 1. 3. tit. 24.

(i) An order for goods, written and signed by the seller in a book of the buyer's, but not naming the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter from the buyer to the seller, claiming the performance of the order, for the purpose of constituting a complete contract within the statute. And it is no objection to the validity of a contract for the sale of goods signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer never signed it. *Allen v. Bennet*, 3 Taunt. 169. And where there was a notice from the purchaser to the vendor, that the corn delivered “in part-performance of my contract for 100 sacks at, &c.,” (setting out the terms,) was bad and unsaleable, and requiring him to fetch the sacks away, with an answer from the vendor's attorney, insisting that they had performed their contract so far as it had gone, and stating their readiness to complete the remainder; it was held that the notice and letter taken together would constitute a sufficient memorandum of the contract within the statute. *Jackson v. Lowe*, 1 Bing. 9. And

In an action on the case against the defendants, for not accepting and paying for certain goods which they had contracted to purchase, it appeared that the contract was made by the following memorandum, in writing¹: "We agree to give Mr. Egerton nineteenpence per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent., as soon as our certificate is complete. (*Signed*) Matthews and Turnbull, and dated 2d of September, 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance; and after it was allowed they signed the memorandum again. Upon this case, Lord Ellenborough C. J. observed, "That the words of the statute were satisfied, if there were some note or memorandum in writing of the *bargain*, signed by *the parties to be charged by such contract*: and that this was a memorandum of the bargain, or at least of so much of

¹ *Egerton v. Matthews*, 6 East, 306.

where one of two parties who were interested in a cargo of oil employed a broker to dispose of it, who did so, and gave the usual sale-note, but it was done without the concurrence or authority of the other, who, however, subsequently consented thereto; it was held, that it was not necessary for the original authority to sell to be in writing, and that the broker's note was a sufficient memorandum within the statute, the subsequent ratification amounting to an original authority. *Soames v. Spencer*, 1 D. & R. 32.

But a memorandum of a sale made by the seller's traveller in his own book, but without any signature, is not a sufficient memorandum in writing of the bargain within the statute, to bind the buyer, although it was read over to him by his desire at the time it was written. And such a defective memorandum cannot be supplied by a letter written afterwards by the buyer, in which although he recognises the order, yet he insists that the goods had not been delivered in time, and that therefore he is not bound to take them. *Cooper v. Smith*, 15 East, 103.

it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute requires ;”—in which opinion the rest of the Judges concurred.

But though the signature of the party seeking the benefit of such a contract is not necessary, so that the note or memorandum is signed by the party to be charged, yet the names of both parties must appear, either on the face of the memorandum, or in something which is thereby referred to, or connected with it by legal inference.¹

Thus, in an action against the defendant², for not delivering to the plaintiff a quantity of treacle, bought of him by the plaintiff, it was proved at the trial, that the bargain for the treacle in question was made between the plaintiff's clerk and the defendant, as stated in the declaration, and that a note was made by the plaintiff's clerk, in a common memorandum-book, specifying the quantity of treacle bought, the price, and time of delivery. In this note the treacle was stated to be “bought of W. Plummer,” *without saying by whom*; and the memorandum was also signed by “W. Plummer.” This was held not to be a sufficient note in writing, and Sir James Mansfield C. J. asked, “How that can be said to be a contract, or memorandum of a contract, which does not *state* who are the contracting parties? By this note it does not at all appear to whom the goods were sold: it would prove a sale to any other person, as well as to the plaintiffs. There cannot be a contract without two parties; and it is

¹ *Hinde v. Whitshome*, 7 East, 569.
Saunderson v. Jackson, 2 B. & P. 258.
Phillimore v. Barry, 1 Campb. 513.
Coles v. Trecothick, 9 Ves. jun. 250.

² *Champion v. Plummer*, 1 New R. 252. 5 Esp. 240. S. C.

customary, in the course of business, to state the name of the purchaser, as well as of the seller, in every bill of parcels.¹ But where the defendant's signature appeared in a book, purporting to be a list of subscribers to a work to be published, and not referring to, or in any way connected with, the prospectus, which contained the terms of the contract, or mentioning the names of the contracting parties, other than such signatures, it was held that such signature could not be connected with the prospectus, so as to take it out of the statute, inasmuch as parol evidence was necessary to show the connection, which was the evil provided against by the statute.²

As to what is a sufficient signing within the intent of the statute, it seems that the writing or printing of the party's name, on any part of the memorandum of the contract, will be considered a signature, though, perhaps, written *alio intuitu*, namely, as a description of the party, vendor or vendee, and not as a signature, with a view to the statute.

As³ where the plaintiff gave the defendants an order for one thousand gallons of gin, and the defendants thereupon gave the former a bill of parcels⁴, the *printed* form of which was, "London, bought of Jackson and Hankin, distillers, No. 8. Oxford-Street;" and then followed, in writing, "1000 gallons of gin, 1 in 5. Gin 7s. 350l." About a month after this transaction, the defendants wrote the following letter to the plaintiff: "Sir, we wish to know what time we shall send you a part of your order; and shall be obliged for a little time in the delivery of the remainder. Must request

¹ Floud. 5. a. Skin. 647.

² *Boydell v. Drummond*, 11 East, 238.

142.

³ *Saunderson v. Jackson*, 2 B. & P.

⁴ Skin. 648.

you to return our pipes. We are, your humble servants, Jackson and Hankin."

In an action on the case against the defendants for the non-delivery of the gin within the time agreed upon, it was insisted on the part of the defendants, that the contract was void by the statute, inasmuch as there was no note or memorandum in writing of the bargain; and a verdict being found for the plaintiffs, under the direction of the C. J., reserving the point made for the consideration of the Court, a rule was obtained to set aside the verdict, and enter a non-suit upon showing cause.

Lord Eldon C. J. (stopping Shepherd, Serjeant, who was to have shown cause,) said, "This bill of parcels, though not a contract itself, may amount to a note or memorandum of the contract, within the meaning of the statute. The single question, therefore, is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds."—"It has been decided¹, that if a man draw up an agreement in his own hand-writing, beginning, 'I, A. B., agree,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note, or memorandum, in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was *meant* to be incomplete, until it was further signed. This last case is stronger than the one now before us, and affords an answer to the

¹ Knight v. Cockford, 1 Esp. 190.

argument, that this bill of parcels was not delivered as a note, or memorandum, of the contract."—Rule discharged. The initials of the party, also, is a sufficient signature.¹ (k)

In the progress of our enquiry into the construction put by the courts upon this section of the statute of frauds, it now becomes necessary to investigate the question, who is an agent of the party to be charged, for the purposes of this act?

Sales are either by private contract or public auction. Sales by private contract are usually transacted through the intervention of brokers, who are for that purpose the agents of the parties, as are also all clerks and servants, without any special authority, where buying and selling is within the scope of their usual employment; but this branch of the subject will be treated of in another part of this treatise. As to sales of goods by public auction, it has long been *vexata quæstio*, whether they are within the statute of frauds, or not.

The most important and leading cases upon this point will be thrown together, with such observations as may

¹ *Phillimore v. Barry*, 1 Campb. 513.

(k) And in another similar case, a bill of parcels, in which the name of the vendor was printed, and that of the vendee written by the vendor, was held to be a sufficient memorandum within the statute, to charge the vendor; and the Court seemed to think it material that the vendor had recognised the printed name, by writing the name of the vendee on the bill of parcels. *Schneider v. Norris*, 2 M. & S. 286

If a note or memorandum be signed by an agent of the party to be charged, it will be sufficient, if the agent be proved to have been thereunto lawfully authorised. *Hicks v. Hankin*, 4 Esp. 114. And a party who has himself signed the agreement, cannot object to it, on the ground that it is not signed by the other party. *Seton v. Slade*, 7 Ves. 265.

suggest themselves to the author: the reader will then form his own judgment upon the subject.

The first case upon this question is, *Simon v. Maitland*, or *Maitland*,¹ which was an action on the case for not taking away certain drugs of the value of 110*l*., which had been bought by the defendant at an auction. The jury having found a verdict for the plaintiff, a new trial was moved for, on the ground that the sale was void under the statute of frauds; being a sale of goods above the value of 10*l*., and there being no earnest, or note, or memorandum, signed by the party. (Another point was made, which is not material to this question.)

The Court expressed the inclination of their opinion to be, "That sales by auction in general are not within the statute." — And Lord Mansfield C. J. said, "They certainly existed in England, and in other countries at the date of this statute. The auctioneer is a third person, who is, to many intents, the agent of both parties. *The solemnity of that kind of sale precludes all perjury*, as to the fact of the sale itself. The contract is executed when the hammer is knocked down. I remember a case where some sugars were bought at an auction, and afterwards consumed by fire in the auction-warehouse, and the loss fell upon the buyer. And, according to the inclination of my opinion, auctions in general are not within the statute. But this is not necessary to be now determined, for if they are within it, the requisites of the statute are well complied with. Every bidding is an accession to the conditions of sale. The name is put down by the buyer's authority. No latitude is left to fraud and perjury from the loose memory of witnesses." — And Wilmot J. said, "It may be a great

¹ 1 W. Black. 599. 5 Burr. 1921.

question, whether sales by auction are within the statute. They were certainly not meant by the act, which was to extend only to the mischiefs created by private and clandestine sales."—I, therefore, incline to think sales by auction, *openly transacted before five hundred people, are not within the statute.*

Upon the ground that, even assuming sales by auction to be within the statute, the requisites of the statute had been complied with by the auctioneer, in writing down the buyer's name; the rule *nisi* for a new trial was discharged.

The observations which arise out of this case naturally resolve themselves into two classes; upon the statute itself, and upon the reasons on which the opinions of the two learned Judges before named were founded.

1st. Upon the statute; the words are, that "*no contract for the sale of any goods, wares, and merchandizes, &c. shall be good except.*"—It becomes material for us then to examine what is a contract? A contract is thus defined by our law; "An agreement upon a sufficient consideration, to do, or not to do, a particular thing."¹ Apply this definition to the contract of sale; it is an agreement by the vendor to transfer a particular article to the vendee in consideration of a certain price. Upon the price, therefore, being ascertained, a present contract is actually completed, though the continuing obligation created by it, may depend upon those ulterior acts imposed by law upon the contracting parties: so by the civil law, *Emptio et venditio contrahitur simulatque de pretio convenerit.*"² Thus, if A. have a horse to dispose of,

¹ 2 Blac. Com. 442.

² Inst. l. 3. tit. 24.

and offer it to B. for fifty pounds, at which price B. consents to buy it, this will be universally allowed to be a contract within the statute, and if any of the requisites prescribed by it are complied with, will be obligatory on the contracting parties. But had this horse been sold by auction, the only difference would have been, that the offer of the price would have come on the part of the vendee, and the assent¹ to that offer on the part of the vendor, by the knocking down of the auctioneer's hammer, by which act, says Lord Mansfield, "the *contract* is executed."²

The same learned and noble Lord says³, "The key to the construction of the act is, the intent of the legislature;" now the intent of the legislature is expressly stated in the preamble of the act, to be "the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury." To carry this intent into effect, the legislature seems to have, most wisely, proposed to remedy the evil, by removing the cause; and in order to obviate the inducement to perjury in support of parol contracts (without any reference to the *quantity* of such parol evidence), it is enacted, in the most general and comprehensive words, that "*no contract*" shall be good, unless evidenced as by the said act is directed. Unless, then, we can say, that a sale by auction is not a contract, it would seem that such a sale is within the meaning of this section of the act.

On another section⁴ of this statute, by which contracts for the sale of *lands*, or interest in lands, are

¹ *Consensus sunt obligationes in emptionibus venditionibus, &c.* Inst. l. 3. tit. 23. and see Plowd. 140. b. 141.

² *Simon v. Metivier*, 1 W. Black. 601.

³ *Ibid.* 600.

⁴ § 4.

also required to be in writing, it has been held by a series of cases, that such sales by auction are within the statute.¹ The reason of the distinction it is not easy to perceive: the *form* of the two clauses is not the same certainly, but the terms, as to the memorandum in writing, are exactly the same.² In the one section the words are, "no action shall be brought upon *any contract*," and in the other, "*no contract* shall be good." Yet the 4th section has been construed to include sales by auction, whilst great doubts have been entertained if a similar construction should be put on the 17th section.

2d. The reasons upon which my Lord Mansfield and Mr. Justice Wilmot inclined to think sales by auction out of the statute, as stated in the report in 1 W. Black., are, "that the solemnity and publicity of that kind of sale precludes all perjury as to the act of sale itself:" upon this my Lord Ellenborough (in *Hinde v. Whitehouse*³) observes, "With all deference to these opinions, I do not at present feel any sufficient reason for dispensing with the *express requisition* of a memorandum in writing in a statute applying to *all sales* of goods above the value of ten pounds *without exception*, merely because the *quantum* of parol evidence in the case of an auction, is likely to render the danger of perjury less considerable. That argument, in a degree, applies to all sales in market overt; and if we once get loose from the positive words of the statute, it will become a question only of the *quantum* and degree of danger of perjury in each particular instance: which opens a

¹ *Stansfield v. Johnson*, 1 Esp. 101. *Walker v. Constable*, 2 Esp. 659., and 1 B. & P. 306. *Buckmaster v. Harrop*, 7 Ves. jun. 344.

² Lord Eldon in *Colles v. Trevelthick*, 9 Ves. jun. 249.

³ 7 East, 568.

door to an indefiniteness of construction, founded on all the varying circumstances of the time, and frequency of persons attending the place of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute, perhaps, more mischievous than beneficial to the trading world, who are to be governed by it. I am not therefore prepared to say, that sales by auction are not meant to be comprehended within the statute;" but His Lordship added, "that he wished not to be understood as giving any conclusive opinion to the contrary." It would be as presumptuous as it is unnecessary to add any thing to what has fallen from so distinguished an authority. Assuming, then, that sales of goods by auction are within the statute of frauds, the auctioneer is an agent for the buyer as well as the seller (1); and a memorandum made by him of the bargain is sufficient to bind both parties.¹ And when he sells goods without naming his principal, he is personally liable upon the contract.²

¹ *Simon v. Metivier*, 1 W. Black. 599. 3 Burr. 1921. *Emmerson v. Heelis*. 2 Taunt. 38.

² *Hanson v. Roberdeau, Peake*, 120.

(1) Lord Chief Justice Eyre held that there was a distinction between sales of goods under the 17th section, and of lands under the 4th section, inasmuch as that in the first case, an auctioneer was not to be considered as the agent of both parties, but that in the latter case he was. *Stansfield v. Johnson*, 1 Esp. 101. This distinction, however, has been since over-ruled, and an auctioneer is now considered as the agent of both parties, whether the sale be of lands or goods. *Emmerson v. Heelis*, 2 Taunt. 38. And he is duly authorised to sign a contract for the purchase on behalf of the highest bidder, and his writing down the name of the highest bidder in the auctioneer's book, is a sufficient signature to satisfy the statute. And if the highest bidder be agent for another, the auctioneer's signature of the bidder's name will bind the principal, at least if he be present and consulting with his agent during the sale, and make no objection before the entry is made in the book. *White v. Proctor*, 4 Taunt. 209.

Thus¹ where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognised the purchase. Held that the entry in the catalogue and the letter, coupled together, were a sufficient memorandum of the contract within the statute of frauds.

But the catalogue must contain a memorandum of the terms of the contract (*m*); or in a case² where sugars were put up to sale in pursuance of a catalogue of sale, which had been previously distributed for that purpose, containing the lots, marks, number of hogsheads, and gross weights of the sugars, and referring for further particulars to the brokers; and they were accordingly sold, according to certain conditions of sale, *which the auctioneer read to the bidders assembled*, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made. It was held, that the name of the purchaser, written by the auctioneer against the lot purchased, in such catalogue, which was not annexed to the conditions of sale, nor had any internal reference thereto by context or the like, was the mere memorandum of the name of a person, and not a memorandum of a bargain under these conditions of sale.³

¹ *Phillimore v. Barry*, 1 Camp. 513.

² Vide *Boydell v. Brammond*,

³ *Hinde v. Whitehouse*, 7 East, 567.

11 East, 142.

(*m*) And in a very recent case upon the sale of a carding machine, by auction, where the auctioneer had put down the purchaser's name in the catalogue only, which contained no reference to the conditions of sale, it was held that it was not a sufficient memorandum of the bargain within the statute. *Kenworthy v. Schofield*, 2 B. & C. 945:

Also where a broker is agent for both parties, the memorandum in his book, signed by him, is sufficient without any bought and sold notes being sent to the parties¹, *a fortiori*, where such notes are sent.² (n)

But one of the contracting parties cannot be considered as the authorised agent of the other; the agent must be a third person.³ (o)

The last consideration which arises upon this branch of the statute is, as to the manner in which such agent must be appointed to satisfy the description of an agent "lawfully authorised." The whole current of the authorities shows that a parol appointment is sufficient⁴; and the authority need not be given with a view to a particular transaction; a general authority is suffi-

¹ *Heyman v. Neale*, 2 Campb. 337.

² *Rucker v. Cammyer*, 1 Esp. 105. Lord Ellenborough in *Hinde v. Whitehouse*, 7 East, 569.

³ *Wright v. Dannah*, 2 Campb. 203.

⁴ Lord Eldon in *Coles v. Trecothick*, 9 Ves. jun. 250., and Lord Kenyon in *Rucker v. Cammyer*, 2 Esp. 105. *Chapman v. Partridge*, 5 Esp. 256.

(n) And it would seem that the bought and sold notes are sufficient without any original entry. *Dickenson v. Lilwal*, 1 Stark. 128.

It has been held, that where a broker employed by both parties negotiates a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract arises. *Thornton v. Kempster*, 5 Taunt. 786. And again, it has been determined at Nisi Prius, that if the notes materially differ, the contract cannot be enforced. *Cumming v. Roebuck*, Holt, 172. Although Sir Vicary Gibbs held, that where a broker in filling up a note, used the name of a former instead of the present firm by mistake, the purchaser was bound, unless he could show that he had been prejudiced. *Mitchell v. Lapage*, Holt, 253.

(o) Therefore if one of the parties write a memorandum of the transaction in the presence, and with the approbation of the other, he cannot by so doing be considered as the agent of the other. *Wright v. Dannah*, 2 Campb. 203. And where the entry was made by an auctioneer in whose name the action was brought, it was held, that it was not sufficient to take the case out of the statute. *Farebrother v. Simmons*, 5 B. & A. 333.

cient.¹ And such authority may be revoked at any time pending the contract; and before a memorandum or note thereof is written and signed.²

It ought here to be observed, that where a party sought to be charged by a parol contract admits the making of such contract, it is out of the statute³; which rule also prevails in equity⁴; but such admission must be pure and unqualified; not relying upon the statute⁵; for where the statute is pleaded, and the exceptions of it negatived, the Court of Chancery will not compel the defendant to execute the contract⁶; so if a parol agreement were stated in a court of law, and there was a demurrer, which would admit the agreement, yet advantage might be taken of the statute⁷; for by the demurrer, the defendant says, he is not chargeable by law, and therefore this is an admission insisting upon the statute.

It will be recollected that these provisions of this section of the statute of frauds are confined to contracts for the sale of goods *above the value of ten pounds*: sales of goods under that value then remain as at common law, when the agreement is to be executed within the space of one year.

And where a contract has been made according to the requisitions of the statute, the property is changed; and vests in the vendee from the time of such sale⁸; and, though no actual change of possession has taken

¹ *Anon.* Loft, 552.

² *Farmer v. Robinson*, 2 Campb. 339. n.

³ Per Mansfield C. J. in *Simon v. Motiour*, 1 W. Black. 600. *Middleton v. Brewer*, Peake, 15.

⁴ 2 Atk. 155. 1 Ves. 218. 221. *Ambl.* 386.

⁵ Prec. in Chan. 208, 374. 353.

⁶ *Whaley v. Bagenal*, 6 Bro. P. C. 45. *Whitechurch v. Bevis*, 2 Bro. C. C. 556., and cases there cited.

⁷ Per Lord Loughborough in *Rondeau v. Wyatt*, 2 H. Black. 69.

⁸ *Hanky v. Smith*, K. B. sittings at Guildhall after E. T. 36 G. 3. Peake, 42. note.

place, remains at his risk, as we may recollect is the case at common law :—this will be seen by the following cases :

In an action for goods sold and delivered¹, it appeared that the goods in question, which consisted of thirteen puncheons of rum, part of the cargo of a Danish prize, were lodged in the warehouses of Messrs. Fector and Minet, at Dover, and sold by auction in various lots on the 28th of April, 1808. By the conditions of sale, a deposit of twenty-five *per cent.* was to be paid immediately, and the remainder of the purchase-money in thirty days. At the end of that time, the purchasers were to carry away the goods, or were afterwards to pay warehouse-rent. The thirteen puncheons of rum, which were the subject of this action, were at such auction bought by the defendant's agent. And on the 18th of the same month, the warehouses in which the rum was, accidentally caught fire, and by means of a quantity of gunpowder lodged in them were blown into the air. There was no evidence of the deposit being paid. It was held by Lord Ellenborough C. J. that the property vested absolutely in the purchasers from the moment of the sale, the agreement to give stowage-room to the goods free of expense for thirty days being intended for the buyer's benefit, and was part of the consideration for which the purchase-money was to be paid. The loss, therefore, fell on the purchaser.

But this is to be understood only where no act remains to be done on the part of the vendor ; for where any act of the seller, such as counting, weighing, filling up, &c. remains to be done, to ascertain the exact quan-

¹ *Phillimore v. Barry*, 1 Campb. 513., and see Lord Ellenborough in *Hinde v. Whitehouse*, 7 East, 571.

tity sold, the property does not vest absolutely¹ in the vendee; but until such act is done remains at the risk of the vendor: as, where² turpentine, in casks, was sold by auction, at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest, before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days, on the goods being delivered, and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for thirty days, after which they were to pay rent. The buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the two last; but left the bungs out, in order to enable the custom-house officer to gauge them; but before he could fill up the rest, a fire consumed the whole of the warehouse, within the thirty days. It was held that *the property passed to the buyers, in all the casks which were filled up, because nothing further remained to be done to them by the sellers*; for it was the business of the buyers to get them gauged, without which they could not have been removed, and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was. *But the property in the casks not filled up remained in the sellers, at whose risk they continued.*

So³, where a quantity of goat-skins were sold under the following contract:

¹ *Hanson v. Meyer*, 6 East, 614.

² *Zagury v. Furnell*, 2 Camp. 240.

³ *Rugg v. Minett*, 11 East, 210.

" Bought of Mr. S. Zagury, of Great Prescott Street, two hundred and eighty nine bales of goat-skins, from Mogadore, per Commerce, Captain John Horawell, containing five dozen in each bale, at the rate of fifty seven shillings and sixpence per dozen, to be taken as they now lay, with all faults, paid for by good bills at five months,

" London, 27th of April, 1809.

" Fourteen days prompt."

It appeared, that by the usage of the trade, it was the duty of the seller of goat-skins by bales, in this manner, to count them over, that it might be seen whether each bale contained the number specified in the contract. It also appeared, that on the 14th of May, before any of the skins in question had been counted over, the whole were destroyed by fire, at the wharf where they lay at the time of sale. It was held by Lord Ellenborough, that as the enumeration of the skins was necessary to ascertain the price, this was an act for the benefit of the seller; and that as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk. (*p*)

But although some act, as weighing or measuring, remains to be done, as between the vendor and a third

(*p*) It has since been held, that on the sale of a certain quantity of hemp, forming part of a larger quantity, the property does not pass until the hemp is weighed off. *Busk v. Davis*, 2 M. & S. 397. Even though a note is given for the delivery on a certain day, and the warehouse room from that day is charged to the buyer. *Shepley v. Davis*, 5 Taunt. 617. And in another case, Lord Chief Justice Gibbs laid it down as a general rule, that while any thing remained to be done, which was necessary to ascertain the price, the property did not pass to the vendee. *Withers v. Lyss*, 4 Camp. 237.

person, yet, if no such act is to be done as between the vendor and vendee, the sale is complete; as, where A., having forty tons of oil in a cistern¹, sold ten tons to B., and received the price; and B. sold the same to C., and took his acceptance for the price at four months; and gave him a written order for delivery on A., who wrote and signed his acceptance upon the said order; but no actual delivery was made of the ten tons, which continued mixed with the rest in A.'s cistern: it was held, that this was a complete sale and delivery of the ten tons, nothing remaining to be done on the part of B., the vendor. (q)

¹ *Whitehouse v. Frost*, 12 East, 614.

(q) But where a sale-note for the purchase of 50 out of 90 tons of oil was delivered by the seller's broker to the purchasers, and they afterwards received from the sellers an order on their wharfinger to deliver the 50 tons; yet as the custom of the trade was for the casks to be searched by the seller's cooper, and for a broker on behalf of both parties to ascertain the foot dirt and water in each cask, and then they were to be filled up by the seller's cooper at their expense; all which was to precede the delivery to the buyer; the Court held that the sale was not complete to pass the property, but that the sellers, on the insolvency and subsequent bankruptcy of the buyers, before such acts done and delivery made, might countermand it. *Wallace v. Breeds*, 13 East, 522.

And two subsequent cases have expressly over-ruled the principle laid down in *Whitehouse v. Frost*; in the first of these, the defendants had contracted to sell to a person certain sugar by a particular description, to be delivered free on board a British ship; that person had sold the sugar to the plaintiff by the same description, and the defendants assented to the re-sale, the sugar not having been delivered or weighed: it was held that the plaintiff could not recover in trover for the sugar, against the defendants, the original vendors. *Auslen v. Craven*, 4 Taunt. 644. And in the other case, it was decided that no property passed by a bargain and sale of 20 tons of oil, out of a merchant's stock consisting of several large quantities of oil, in divers cisterns, and in different places, because there must be a separation of the part sold from the rest of the stock. *White v. Wilks*, 5 Taunt. 176.

Herein our law agrees with the principle of the civil law: "*Quam autem emptio et venditio contracta sit, (quod effici diximus simulatque, de pretio conoenerit,) periculum rei venditæ, statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit.*"¹ Which passage is thus explained by Vinnius²: "*Est vero in his rebus probata hæc distinctio ut si omne vinum vel oleum, vel frumentum, vel argentum, uno pretio seu aversione venierit, idem juris sit, quod in cæteris rebus perfecta que emptio intelligatur, statius ut de pretio convenit. Quod si hæc non uno pretio, sed ita venierint, ut in singulas amphoras vini, in singulas metretas olei, in singulos modios frumenti, in singulas libras argenti, certum pretium diceretur, non prius, quantum ad periculum, perfecta videatur venditio quam res hujusmodi adnumeratæ, admensæ, appensæve sint, quasi venditio sub hac conditione contracta sit.*"³ (r)

¹ Inst. l. 5. tit. 24.

³ See also Ff. l. 18. tit. 6. Cod. l. 4.

² Comment. in Inst. l. 3. tit. 24. tit. 18.
vol. ii. p. 188.

(r) Another subject deserves consideration in this place, which is the operation of the stamp acts upon contracts of sale; and it may be mentioned as a general rule, that whenever an instrument is directed by the legislature to be stamped, it cannot be received in evidence without such stamp, nor can parol evidence of its contents be given. By the last stamp act, 55 Geo. III. c. 184, and indeed by all the prior statutes, memorandums, letters, or agreements, made for or relating to the sale of any goods, wares, and merchandizes, being exempted from the operation of the statute, need no stamp. Upon this clause of exemption, about which considerable doubts have arisen, as to what things are exempted, it has been decided that a contract of indemnification from loss on a resale made by a broker at the time of a purchase for his principal, *Curry v. Edensor*, 3 T. R. 524.; and a guarantee to pay for goods to be purchased by a third person at a future time, are within the exempting clause, and therefore require no stamp. *Warrington v. Furber*, 8 East, 242.

And in putting a construction upon the clauses of exemption, the Courts look at the primary object of the agreement; which, when it is for the sale of goods, requires no stamp, although it may be mixed up with other stipulations; thus, a contract for the sale and delivery of rape oil, not yet expressed from the seed in the vendor's possession, has been held to be within the exemption. *Wilks v. Atkinson*, 6 Taunt. 11. And an agreement for the sale of goods need not be stamped, although it contain stipulations concerning the time of payment, or other circumstances besides the mere sale of goods. *Heron v. Granger*, 5 Esp. 260. But where the parties had some other principal object in view beyond the mere sale of goods, the agreement must be stamped, although it may collaterally relate to the sale of goods: thus, a letter from a principal to his broker, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods, then in the broker's hands, should remain unsold at the time of the bills falling due, requires to be stamped, for the primary object of the letter was to obtain money upon a pledge of the goods. *Smith v. Cator*, 2 B. & A. 778. And a letter to a correspondent, requesting him to pay to certain persons or their order 600*l.* out of a certain fund, and to charge the same to account, is not within the exemption of the act, but must be stamped as a bill of exchange, although the letter forms part of a subsequent correspondence between the parties. *Butts v. Swan*, 2 B. & B. 78.

The following documents have been held not to require a stamp: An agreement entered into out of England. *Ximenes v. Jaques*, 1 Esp. 311. An agreement by which a party agrees to take half of the goods purchased by another person. *Venning v. Leckie*, 13 East, 7. Where, after a breach of contract for the sale and delivery of goods, the parties enter into a fresh agreement in writing, to cancel the former one, and for the sale of goods upon different terms, the second agreement does not require a stamp. *Whitworth v. Crockett*, 2 Stark. 431. A memorandum in writing, ordering goods, but not containing the terms of the contract between the parties, may be read in evidence without a stamp. *Ingram v. Lee*, 2 Camp. 251. A receipt for the price of a horse, containing a warranty of soundness, which has a receipt stamp, comes within the exemption, and does not require an agreement stamp. *Brown v. Frye*, 2 Camp. 407. And an I. O. U. is admissible as evidence of a debt without a stamp. *Childers v. Boulnois*, 1 D. & R. 8.

But an agreement between two parties, that one shall take a share in the outfit of a ship, and in the adventure, is not within the exemption, and requires a stamp. *Leigh v. Banner*, 1 Esp. 403. And if an instrument be executed in a foreign country, and by the laws

of that country a stamp is required, it cannot be received in evidence in the courts of this country, unless it is stamped with the proper stamp imposed upon such instruments by the laws of the foreign country. *Alves v. Hodgson*, 7 T. R. 241.

SECT. II.

Of Executory Contracts of Sale.

THE contract of sale may be executory in two points of view: 1st, where it is executory on the part of both the contracting parties; 2dly, where executory on one part only.

Where the contract is wholly executory, as in contracts for the sale of goods in which the vendor has no present property, it is more properly an agreement to sell, than an actual sale, which can only be of a *chose* in possession.¹ This species of contract is well known to mercantile men, amongst whom it is very usual to contract for the sale of goods, which they have reason to expect will be consigned to them by their correspondents abroad, as in the case of *Boyd v. Siffkin*², which was an action for the non-delivery of hemp. The declaration, after stating that the defendant expected an importation of hemp into this country, in a certain ship, called the *Fanny Almira*, alleged that he agreed to sell to the plaintiff, on arrival of the said ship *Fanny Almira*, about thirty-two tons, more or less, of Riga Rhine hemp, at eighty-two pounds ten shillings per ton, from the land-

¹ Co. Litt. 214. Plowd. 9. d.

² 2 Camp. 326.

ing scale; the amount to be paid by bills at six months. The bought and sold note produced was dated 13th of August, 1808, and was in the following form: "*Sold* for Mr. H. Siffkin to Mr. M. Boyd, about thirty-two tons, more or less, of Riga Rhine hemp, *on arrival*, per Fanny and Almira, at eighty-two pounds ten shillings per ton," &c.

The ship afterwards arrived, but without a cargo.

Garrow, for the defendant, contended, that the contract was improperly set out in the declaration; on arrival, meaning not on the arrival of the ship, but of the hemp; and he cited *Hawes v. Humble*.¹

The Attorney-General argued that this was a sale of the quantity of hemp mentioned in the note, depending only on the contingency of *the ship's arrival*; and that the defendant had undertaken, that if the ship did arrive, she should bring so much hemp as was thus sold: but Lord Ellenborough said, "I clearly think, *on arrival*, means on arrival of the hemp. The parties did not mean to enter into a wager. By *bought* and *sold*, in the note, must be understood, *contracted to sell and to buy*. The hemp was expected by the ship; had it arrived, it was sold to the plaintiff. As none arrived, the contract was at an end." Plaintiff nonsuited.

The case of *Hawes v. Humble*, cited in the foregoing case, was exactly similar; the facts of that case are shortly these:

The defendant, by a broker, had sold to plaintiff, *on arrival*, one hundred tons, more or less, of Teneriffe barilla, in the defendant's ship Bon Fim Tuan Feliciano, from Teneriffe. The Bon Fim arrived, but without any barilla: And it was held by Wood, B., that

¹ Cited in 2 Camp. 527.

the contract was conditional; but he intimated, that if any negligence could be proved against the captain, in not procuring the barrels, he would receive the evidence; but no such proof was given. (s).

The Court of King's Bench afterwards refused a rule to show cause why there should not be a new trial, agreeing completely with the learned Judge who tried the cause.

So, if a merchant in London contract for the sale of *all* the goods of a particular description which his agents abroad may ship by certain vessels. As¹, where, in an action for the non-delivery of hemp, the agreement proved was as follows: "Sold for Messrs. Scougall and Co., to Messrs. Hayward and Co., *all* the sound merchantable Riga Rhine hemp that may be loaded by the Pilgrim, Webster, and one or two other ships, not exceeding three hundred tons, now at Riga, *by the supercargo of the said vessels, or Messrs. Schmidts and Co., the agents of the concern*; the names of the ships to be given up when received, at eighty-one pounds per ton."

The names of two other ships were subsequently given up; but when they arrived along with the Pil-

¹ *Hayward v. Scougall*, 2 Camp. 56.

(s) And where a contract was made in London, for the sale of tallow, by a particular ship, *on arrival*, and it was specified that if it did not arrive before a given day, the bargain was to be void; and the ship was wrecked, but the cargo was saved, and might have been sent to London before the specified day, if due diligence had been used, and the tallow had been sent by a route contrary to the ordinary course of carriage: it was held that the sellers were not answerable for the non-delivery of the tallow, and that it was the intention of the parties that the contract should be void, unless the commodity, in the ordinary course of trade and navigation, arrived at the port of destination by the appointed day. *Idle v. Thornton*, 3 Camp. 274.

grain, it appeared that although Messrs. Schiffs had loaded each of them with a full cargo of hemp, they had not shipped by them more than seventy-one tons, on account of the defendants. That quantity was delivered to the plaintiffs; and the question was, whether the defendants were not bound to deliver three hundred tons, so much having been shipped on board of these vessels at Riga: but it was held they were not; and Lord Ellenborough, C. J., construed the contract thus: "*We will sell you all that our agents at Riga ship for us, to the amount of three hundred tons. If they send us so much, you shall have it; if they send us none, we have sold none to you.*" (t)

But if the vendor, in contracts of this sort, state in the contract that the goods agreed to be sold shall actually be shipped, in that case he is liable, at all events, whether the goods be in fact shipped or not: as in *Splidt v. Heath* and others¹, where the bargain was for a certain quantity of hemp, sold by the defendants to the plaintiffs, to be shipped on or before the 31st of August, old style. In this case, a full cargo had been prepared by the agents of the vendors; but before

¹ 2 Camp. 57. n.

(t) Under a contract to sell 50 tons of hemp, to be delivered by a certain day, and the ship's name to be declared as soon as known, it was held that the seller was not bound to send all by one ship; and although by mistake he had announced more to be coming by one ship than there actually was, he was at liberty to declare the residue to be coming by other ships. *Thornton v. Simpson*, 6 Taunt. 556. And such a stipulation to declare the name of the ship as soon as known, is a condition precedent, and if not complied with, the breach will be a defence to an action for not accepting the goods. *Busk v. Spence*, 4 Camp. 529.

shipment it was seized and confiscated by the Russian government. But this was held to be no defence in an action for the non-performance of the contract; as the defendants had absolutely engaged that the hemp should be shipped; and, therefore, from whatever cause it had arisen that it had not been done, they were liable (u).

To this class of executory contracts also belong those cases where the thing contracted for is not *in esse*, as goods, but is sold (or, more properly, agreed to be sold) with a view to its prospective existence as such; such as the case of a chariot to be built¹, corn to be thrashed², a waggon to be made³, or a barge built⁴; which differ from a sale of goods *in presenti*, inasmuch as no property vests in the vendee in these cases, till the thing contracted for acquires the character in which it is to be delivered, and that though the whole price be paid in advance⁵; whereas in present sales we may re-

¹ *Towers v. Osborne*, 1 Str. 506.

⁴ *Mucklow v. Mangles*, 1 Taunt.

² *Clayton v. Andrews*, 4 Burr. 2101. 518.

³ *Dunmore v. Taylor, Peake*, 41.

⁵ *Ibid.*

(u) This principle was recognised in a case where the master and freighter of a vessel had mutually agreed in writing, that the ship should proceed to Saint Petersburg, and there load a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight, &c.; it was held, that the master having sailed away from St. Petersburg with only about half a cargo, upon a general rumour of an hostile embargo being about to be laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo; and that the law was so, although the jury found that he had acted *bona fide*, and under a reasonable and well-grounded apprehension at the time; and although an hostile seizure under an embargo was in fact made in six weeks after he had departed. *Atkinson v. Ritchie*, 10 East, 590.

collect the property vests immediately in the vendee by the bargain.¹

In these executory contracts, as soon as the thing contracted for is complete and ready for delivery, the contracting parties acquire mutual rights to demand: the one the goods, the other the price²; but these are reciprocal dependant rights; for the vendor may still retain his goods till paid, and the vendee may maintain trover for the goods, if they are not delivered upon tender of the price³, unless it has been otherwise agreed between the parties.

It may not be unnecessary here to observe, that in those executory contracts mentioned in the first part of this section, the property in the thing sold vests in the vendee upon arrival, *i. e.* where the *transitus* is completely at an end, and the absolute property (in the absence of any sale), would have vested in the vendor; provided the vendee perform, or offer to perform the contract on his part, in such case the *contract to sell*, is changed into a *contract of sale*.⁴

Executory contracts for the sale of goods above the value of ten pounds only, and which do not relate to the making of that which may hereafter become goods, we may remember, are considered to be within the seventeenth section of the statute of frauds, the requisites of which must consequently be complied with to render these contracts binding⁵; and *all* executory contracts, which *are not to be performed* within one year from the making, whether for the sale of goods, (without reference to the value,) or the doing of any other act;

¹ And see what is said by Heath, J. in *Muchins v. Mangles*, 1 Taunt. 320.

² *Tipper v. Osborne*, 1 Str. 506. *Dunmore v. Taylor, Peake*, 41. *Mucklow v. Mangles*, 1 Taunt. 320.

³ Noy's Max. c. 42.

⁴ Noy's Max. c. 42. Com. Dig. tit. Agreement. (a. 2.)

⁵ Ante, p. 7.

must be in writing, by the fourth section of the same statute; by which it is enacted, "that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This clause of the statute is confined to those cases where it clearly appears to have been the understanding of the parties, that the contract was not to be completed within a year¹; but it does not include contracts which by possibility, and in the contemplation of the parties, may be performed within the year, though the contingency on which they depend does not, in fact, happen within that time; as in the case² of a promise on a good consideration to pay money on the return of a ship, which by possibility might return within a year, such promise by parol is good, though the ship do not return till after the year is expired.

So, in the case of *Peter v. Compton*³, which was an action on the case upon an agreement, in which the defendant promised, for one guinea, "to give the plaintiff so many at the day of his marriage." The question was, if such agreement ought to be in writing? for the marriage *did not happen within one year*.—It was held by a majority of the judges, against the opinion of Holt, C. J., and another, "That where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not

¹ *Boydell v. Drummond*, 11 East, 155.

² *Anon.* 1 Saik. 280.
³ *Skin.* 353.

necessary; for the contingent might happen within the year: but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary, otherwise not."

The opinion expressed by Lord Holt, and the other judge, who agreed with him, was, that where the contingency happens within the year, no note in writing is necessary, *aliter* if it do not happen till after the year: for they considered, that as the statute was made to prevent perjury, it was the design of the framers of it, not to trust to the memory of witnesses for a longer time than one year¹; an opinion which carries great plausibility with it, and would stand well with the words of the statute, which speaks of "agreements that are not to be performed."

The contrary opinion, however, is held for law at this day, and it was so decided in *Fenton v. Emblers*², which was an action against an executor for non-performance by his testator of an agreement by *parol*, entered into between him and the plaintiff, by which he agreed, that, in consideration that the said plaintiff would be, and become the housekeeper and servant of the testator, and take upon herself the care and management of his family, &c. as long as it should please both parties, the testator promised to pay wages to the plaintiff, at and after the rate of six pounds for a year; "and also, by his last will and testament, to give and bequeath to the plaintiff, a legacy or annuity of sixteen pounds by the year, to be paid and payable to her yearly, and every year, from the day of the testator's death, for

¹ *Smith v. Westall*, 1 Ld. Raym. 516, 317. *Francom v. Forster*, Skin. 326. *Reynolds v. Spencer*, Cowp.

in Scacc. in 1726. Vin. Abr. tit. Cont. & Agmt. p. 524. § 47.
² 3 Burr. 1281. and 1 W. Black. 353, S. C.

and during the term of her natural life."—It appeared that the plaintiff had under this agreement, entered into the service of the testator, and had continued with him for *more than three years*, but that he had not left her the legacy or annuity.—Upon an objection being taken, that this agreement was within the statute of frauds, being to be performed after the expiration of a year, the Court held, that it was out of the statute. *Per Denison, J.* "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency. It does *not* extend to cases where the thing *only may* be performed within the year."

But, to take a case of this sort out of the statute, it should appear, that the parties contracting understood and contemplated a possibility of a complete, and not a partial performance, within the year.

For where ¹ A. had proposed to publish by subscription, a series of large prints from some of the scenes in Shakspeare's plays, after pictures to be painted for that purpose, under certain conditions, viz. seventy-two scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints, at the price of three guineas a number, two of which were to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; and that one number at least should be *annually* published. B. had become a subscriber for a set of these prints, and paid his two guineas; but afterwards refused to pay the remaining part of his subscription and take the prints.

¹ *Boydell v. Drummond*, 11 East, 142.

An action was brought against him upon the contract contained in the prospectus: but the plaintiff failing in proving a contract in writing, signed by B., was nonsuited. And, upon showing cause against a rule for setting aside the nonsuit, it was unanimously held, that the action was not maintainable, inasmuch as this was not a contract to be performed within a year, and which ought therefore to have been evidenced by writing, signed as required by the statute of frauds; and per Lord Ellenborough C. J., "The whole scope of the undertaking shows that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued, that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is *performed*, which, *ex vi termini*, must mean the complete performance or consummation of the work:"—"besides, by the very terms of the contract, and clearly in the contemplation of the parties from the whole scope of it, it was not to be performed within a year, for the agreement was to publish at least one number *annually*, after the delivery of the first." (v)

(v) A contract for a year's service, to commence at a subsequent day, being a contract not to be performed within the year, is within the 4th section of the statute of frauds, and must be in writing; and therefore no action can be maintained for the breach of a verbal contract made on the 27th of May, for a year's service, to commence on the 30th of June following. *Bracegirdle v. Heald*, 1 B. & A. 722.

With respect to that class of contracts falling within the fourth section of the statute of frauds, and as much required to be evidenced by a note in writing, it is proper to point out a distinction which has been drawn between them, and those falling within the seventeenth section; which arises from the different wording of those two clauses.

The words used in the seventeenth section are, "No contract, &c. shall be good, except the buyer shall accept, &c., or that some note, or memorandum, in writing, of the said bargain, be made and signed, &c." But, upon referring to the clause under consideration, we find it is enacted, "that no action shall be brought," in the cases there enumerated, unless the "*agreement* upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, &c."

The whole of this difference turns upon the word *agreement*, made use of in the latter section. An agreement is defined by our law to be "*aggregatio mentium*," or the union of two or more minds in a thing done, or to be done¹, and is, therefore, not to be understood in the loose incorrect sense in which it is sometimes used, as synonymous to promise, or undertaking; but in its more proper and correct sense, as signifying a mutual contract or consideration between the parties. The promise, therefore, of the party to be charged alone, will not satisfy the word agreement; the consideration for such promise must also be supplied to make a perfect agreement, so that each party may see what he is to do or suffer; what is required to be in writing, therefore, is the *agreement* as thus explained,

¹ Plowd. 5 a. 6 a. 17 a. Dyer, 536. b.

or some note or memorandum of it. This will be illustrated by the following cases :

This was an action upon a promise to pay the debt of a third person in consideration of forbearance to sue.

In support of the action, the plaintiffs, on the trial produced the written engagement, signed by the defendant, which was in these words: "Messrs. Wain and Co., I will engage to pay you, by half past four this day, fifty-six pounds, and expenses on bill to that account on Hall. (Signed) John Walters;" (and dated) "No. 2. Cornhill, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, was in writing, as required by the statute of frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call, in order to explain the occasion and consideration of giving the note); and that, for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another, without any consideration; and was therefore *nudum pactum*, and void; of which opinion was Lord Ellenborough C. J., and, therefore, nonsuited the plaintiffs.

A rule *nisi* was afterwards obtained for setting aside this nonsuit, and granting a new trial, on the ground, that the statute only required the promise, or binding part of the contract, to be in writing; and that parol evidence might be given of the consideration, which

¹ *Wain v. Walters*, 5 East, 10.

did not go to contradict, but to explain and support the written promise. — But the Court agreed with the Chief Justice, and held, that if they were to admit parol evidence to show the consideration of the promise, the effect would be to open a door to those very frauds and perjuries which it was the object of the statute to prevent; they therefore discharged the Rule.¹

This² was an action on the case for the breach of a guarantie, in not paying the value of goods delivered by the plaintiff to one Nichols. The defendant gave a written guarantie, signed by him, in this form: "I guarantee the payment of any goods, which J. Stadt, delivers to J. Nichols." It was objected at the trial before Lord Ellenborough C. J., at Guildhall, that this guarantie was void under the fourth section of the statute of frauds, 29 Car. 2. c. 3., which avoids any promise to answer for the debt of another, unless the agreement be in writing, &c., and *Wain v. Warlters* was cited, to show that the word agreement included the consideration for the promise, as well as the promise itself: and here there was no consideration stated for the promise. But Lord Ellenborough was of opinion, that the stipulated delivery of the goods to Nichols was a consideration appearing on the face of the writing, and when the delivery took place, the consideration attached, and he directed the jury accordingly, who found for the plaintiff; but he gave leave to the defendant to move to enter a nonsuit, if this direction were wrong.

A motion was afterwards made, but the court were

¹ See also *ex parte Minet*, 14. Ves. jun. 182, and 15 Ves. jun. 287.

² *Stadt v. Lill*, 1 Camp. 242, 9 East, 348. S. C.

satisfied that the direction was right, and refused the rule. (w)

(w) The true state of the law upon the subject of guaranties, it seems, may be collected from the rule laid down in the case of *Wain v. Warlters*, at the same time considering the case of *Stodd v. Lill* as an exposition by the Court of King's Bench of that rule; namely, that it is necessary that the consideration for the promise should be stated, as the word "agreement" used in the statute, includes the consideration, but that where it is a conditional guarantie, the condition will in general be a sufficient consideration. This will appear to have been the rule acted upon, from the following recent cases. In a late decision in the Exchequer on this guarantie, — "Sir, you will herewith receive back your invoice of nine bags, left on Wednesday, as Mr. Anderton does not now send me his goods to sell; I guarantee all he has bought from you before Tuesday last, but will guarantee no further." The court held, on the authority of the case of *Wain v. Warlters*, that this guarantie was void, for not sufficiently containing the consideration for which it was given. *Lyon v. Lamb*. Fell on Merc. Guar. 228. And in two other very late cases, in one of which, an engagement in consideration of staying proceedings in the following terms: — "Mr. W. will engage to pay the bill drawn by W. P. in favour of S. S.," was held insufficient, as not containing any consideration. *Saunders v. Wakefield*, 4 B. & A. 395. And in the other, a letter in these terms, "To the amount of 100*l.* consider me as security on J. G.'s account, dated and signed W.R.," was likewise held insufficient. *Jenkins v. Reynolds*, 3 B. & B. 1.

But where an action was brought on the following guarantie, "I herewith hand your drafts drawn by Mr. Wallis, and accepted by Mr. Bromley, and indorsed by R. Burns; and should the bills not be honoured when due, I promise to see that they do so;" Lord Chief Justice Gibbs said, that the guarantie was sufficient, as it appeared on the face of the letter, that in consideration that the plaintiff would take the notes, the defendant would indemnify him, and that he thought the consideration was sufficient. *Morris v. Stacey*, Holt, 153. And in another case, it was decided that a letter to an attorney, stating, "I trust you will give A.B. indulgence till next week, when I will undertake to see you paid," was a sufficient promise to pay the debt, which the attorney was employed to recover. *Bateman v. Phillips*, 15 East, 272.

Questions of this sort can very rarely occur in practice, on contracts of sale which may fall within this section; as they are usually evidenced by the broker's bought and sold notes, which contain, in general, a note of *the whole agreement*; it is, however, considered necessary to give some account of the decisions on this branch of the statute.

2dly. Contracts of sale may also be executed on one part, and executory on the other; as if, on an agreement for the purchase of goods, the vendee pay the price in advance; here the contract is executed by him, and executory by the vendor; or if, as is more frequently the case, the goods are presently delivered by the vendor, to be paid for by the vendee at a future period, the contract will then be executory on the part of the vendee only; in both of which cases the property of the thing sold vests immediately in the vendee¹; that is, where the contract is for goods existing *in solido*, at the time of the contract; for we have seen no property passes till delivery, by a contract for goods to be manufactured for the vendee; indeed a contract of this sort is not strictly a contract for the sale of goods, but for work and labour; it is that species of contract which the civilians call *do ut facias*.

In the first case put upon this class of contracts, where the vendee pays the price in advance, the goods immediately become his, and may be recovered from the vendor, and all others into whose possession they may fall, by an action of trover; or the vendee may have, at his election, an action against the vendor for non-performance of his contract.

¹ 10 H. 7, 8. a. 14 H. 8. 20. a. Dyer, 50. a. Bro. Contract, 35. Kit. 181. a. Noy's Max. c. 42. Muck-

low v. Mangles, 1 Taunt. 318. Ex parte Flinn, 1 Atk. 185.

So, *e converso*, where the goods are delivered upon credit, they become as absolutely the property of the vendee as if the money were actually paid; and upon failure by the vendee in paying for them at the stipulated time, the vendor cannot claim a re-delivery of the goods, but must resort to his action for recovery of the price: but to vest such an absolute indefeasible property the goods must have actually come to the hands of the vendee, for otherwise, as we shall have occasion to mention in another part of this treatise, the vendor has a right to stop the goods *in transitu*, upon non-performance of the contract on the part of the vendee, or his insolvency.

Where there is a regular sale note, the term of credit, and manner of payment, whether by cash or bill, is usually specified: in transactions of any magnitude the payment is usually made by the acceptances of the vendee, payable at given periods, to be given immediately upon the sale, or at the expiration of a specified credit; or a period is fixed for the payment, without the vendee being required to give any negotiable security in the mean time. In some branches of trade, custom has fixed one universal standard as to the period of credit upon sales of goods; and upon sales in the usual course of such trades, where no specific stipulation is made in the contract¹, this customary credit is as much a part of the contract as if *expressly* agreed upon, the law implying that all persons deal according to the general usage, unless the contrary appears.

In any of these cases, the contract of sale remains executory on the part of the vendee till the expiration of such period of credit; and the vendee cannot main-

¹ *Swancot v. Westgarth*, 4 East, 74. and what is said by Lord Ellenborough in *Gordon v. Swan*, 2 Camp. 429. n.

tain an action for the value of his goods in the interim ; though where, by the terms of the sale, the vendee is to give his acceptance for the price at any given time and does not, the vendor may bring a special action on the case against him for not accepting ; in which action he will recover damages for the injury he has actually sustained by the breach of contract, such as the loss of interest, &c. (x) This will be seen by the following cases.

In an¹ action for goods sold and delivered, tried before Rooke J. at the Lancaster assizes, the question was, whether the action were commenced before the time of credit, on which the goods had been contracted to be bought, had expired. The goods in question were a quantity of cotton, valued at two hundred and seventeen pounds, for which payment was to be made by the defendant in three months after the 15th of September, 1802 (the day on which the bargain was concluded), by a bill at two months. The action being commenced before the expiration of five months from the 15th of September preceding, the defendants' counsel objected that it was prematurely brought, and therefore that the plaintiff should be nonsuited : but the learned Judge held, that unless the defendants could show (which they did not do), that they had given or tendered such a bill at the end of three

¹ *Mussen v. Price*, 4 East, 147.

(x) But where the agreement was for three months' credit, and then, if farther time was wished, a bill at three months ; it was held, that it was not a credit for six months certain, but that *indebitatus assumpsit* would lie at the end of the first three months if there was no bill given. *Nickson v. Jepson*, 2 Stark. 227.

months, the action would lie for goods sold and delivered. Accordingly the plaintiff recovered, but the point was saved for the consideration of the Court. A rule *nisi* having been obtained for setting aside the verdict, and entering a nonsuit, principally upon the authority of a case of *Millar v. Shawe*, at Lancaster Lent assizes, 1801, before Chambre J. where the plaintiff was nonsuited on a similar objection, Cockell Serjt. Holroyd and Yates, shewed cause against the rule, and contended that the contract was in substance for the sale of the goods upon a credit of three months only, with a further credit, *upon condition* upon the defendants giving a good bill; that not having done so, upon the condition broken, the plaintiff might recur to his remedy of *indebitatus assumpsit* for goods sold and delivered, the consideration having failed on which he had agreed to suspend his claim; and they referred to *Puckford v. Maxwell*¹, and *Owenson v. Morse*.² Topping and J. Clarke, *contra*, relied on the case of *Millar v. Shawe*, of which they read the following note, taken by a gentleman at the bar. "Action for goods sold and delivered. — The plaintiff's evidence proved, that the goods were sold at *two months and two months*, that is, to be paid for at two months, by a bill at two months, which the witness considered as cash at four months. The action was brought before the expiration of the four months, and the declaration was in the usual form, containing the usual counts of *indebitatus assumpsit* and *quantum valebant* for the amount. Topping, for the defendant, contended that no debt existed at the commencement of the action, nor till the four months were expired; but that the plaintiff might have brought

¹ T. R. 52.² 7 T. R. 64.

his action after the expiration of the two months, and before the end of the four months, upon the breach of his contract for the non-delivery to him of a bill; but that no action of *indebitatus assumpsit* would lie till the end of the four months. Cockell Serjt. and Yates, contended, that as the defendant had not given the bill at the end of the two months, they might abandon the contract, and recover the price of the goods, for want of the bill, which, if given, the plaintiff was to accept in lieu of money. And Chambre J. at first seemed to be of that opinion; but on hearing Topping for the defendant, as above, he thought that after the four months the plaintiff need not have declared on the contract, but the money being then due and unpaid, he might declare in the usual way, and recover the price as a debt, on an *indebitatus assumpsit*. Before that time, however, he thought the plaintiff's only remedy was for breach of the promise, in not delivering the bill at two months. Plaintiff nonsuited. Cockell Serjt. then said, that Chambre J. had ruled the same in another cause, at a former assizes, at York." They then observed, in answer to a case put by the other side of a drawer of a bill, against whom an action lies immediately upon the dishonour of his bill, that generally there is no contract for time in such cases, but an antecedent debt from the drawer, and an *indulgence voluntarily* granted by the payee. Then upon the failure of the consideration the party is referred back to his original action.

Lord Ellenborough C. J. inclined to consider this contract as an absolute agreement for a credit of three months, with a stipulation on behalf of the defendant, that at the end of the three months he should be at liberty to give the plaintiff a bill at two months for pay-

ment, which was to be taken for such if the conditions were performed. "Whatever respect, therefore, (said his Lordship), I feel for the opinion which has been cited (Mr. Justice Chambre's), the present feeling of my mind is that this action is well brought." Lord St. Grose J. thought the action ought to have been brought for not giving the bill, which the defendant had undertaken to do, and not for goods sold and delivered, in which case the promise is to be implied from the circumstances of the case; but this was not the case of an implied, but of an express promise.

Lawrence J. was of the same opinion. The proper ground of action is the non-performance by the defendant of his agreement with the plaintiff. The agreement for the plaintiff goes upon an assumption that the giving of the bill was a *condition*, upon which the credit was to be extended beyond the three months. But I see *no condition* in the contract; there were no words of condition. The giving of the bill at two months was a term introduced into the contract for the benefit of the seller, that at the end of three months he might have in his hands an instrument which he could negotiate.

Le Blanc J. expressed himself of the same opinion, and observed, that the cases alluded to, have been where goods have been sold, and a bill taken in payment, *payable at a future day, but without any express contract for time for the payment of the goods; and thereupon the bill being dishonoured, the drawer has been sued immediately.*

The majority of the judges, therefore, being of opinion that the action was not maintainable, the rule for entering a nonsuit was made absolute.

This was an action¹ for goods sold and delivered. At the trial before Lord Alvanley C. J. at Guildhall, sittings after Trinity Term, 1803, it appeared, that on the 10th of August, 1802, the goods in question were purchased by the defendant, of the plaintiff, at Manchester, *to be paid for by a bill at two months*; that a bill was accordingly drawn upon the defendant for the amount of the goods, and tendered for acceptance on the 27th of August, which was refused, the defendant declining to accept any bill, except a bill at three months, and that not until after the goods should have arrived. The goods were delivered by the plaintiff at the common waggon-office, a few days after the receipt of the order, but did not arrive in London until the 9th of October. The writ was sued out on the 6th of September. The jury found a verdict for the plaintiff; but liberty was reserved to the defendant, to move that this verdict might be set aside, and a nonsuit entered.

Accordingly a rule *nisi* for that purpose was obtained, which was afterwards made absolute, upon the authority of the case of *Mussen v. Price*; and it was said by Lord Alvanley C. J. in delivering the opinion of the Court, that Mr. Justice Rooke, who had ruled that *indebitatus assumpsit* would lie in such cases, was perfectly satisfied with the decision of the Court of King's Bench.²

But where in an action³ for goods sold and delivered, it appeared, that the goods in question were originally sold at two months' credit, to be paid for by a bill at twelve months, that more than fourteen months had elapsed between the delivery of the goods and the commencement of the action, and that the goods had

¹ *Dutton v. Solomonson*, 5 B. & P. 582.

³ *Brooke v. White*, 1 New R. 330.

² See also *De Symons v. Minchwich*,
1 Esp. 430.

not been paid for; the Court held that the vendor might recover in such action, the period of credit being expired.

The general rule seems to be, that when the contract is executory the party must declare specially, but that, when it is executed, he may declare generally.¹

So where by the contract, the money is to be paid at a future day, the vendor cannot sue till that period arrives, though it was agreed he should have negotiable security in the mean time, but which turns out to be useless, being on a wrong stamp.² (y)

But if credit be given by the vendor as a voluntary act, subsequent to, and not making any part of the original contract, it may at any time be revoked³; though if the vendor, being entitled to demand immediate payment, take a bill payable at a future day, he cannot commence an action for the original debt, until that period expires, if such bill is a valid security.⁴

¹ *Alcorn v. Westbrook*, 1 Wils. 116.
Weston v. Downes, Dougl. 25. *Power v. Wells*, Cowp. 818, and *Dr. Compton's case*, cited in 1 T. R. 156.

² *Swears v. Wells*, 1 Esp. 517.

³ *De Symons v. Minchwich*, 1 Esp. 430.

⁴ *Stedman v. Gooch*, 1 Esp. 5.

(y) And where goods were sold and delivered, upon an agreement to be paid for by a present bill, payable at a future day, it was held that no action was maintainable, before the time when the bill would become due, and when the contract would become no longer executory: *Hoskins v. Duperoy*, 9 East 498. And where a person purchased goods, and agreed to pay for them by a bill at three months, which he afterwards refused to accept, it would seem, that an action for goods sold and delivered would not lie until the expiration of the three months, before which period it should have been an action for not accepting. *Lee v. Risdon*, 7 Taunt. 188.

SECT. III.

Of Conditional Contracts of Sale.

Conditional sales may seem perhaps to resolve themselves into the species of contract treated of in the last section, inasmuch as all sales upon condition may be considered as executory till the condition is performed; but, upon a closer view of the subject, we shall find this distinction, that in the contracts which are the subject of the preceding section, the contract is complete, and the *execution* of it only, suspended; whereas in sales on condition, the continuation of the *contract itself* depends upon the condition. Thus, if a man sell goods for so much as *A.* shall name, the contract is not complete till *A.* names the price¹; though the goods are so far bound, that if *A.* do afterwards name the price, the contract is complete; and if the vendor sell the goods between the contract and the price being ascertained, an action on the case lies against him²; yet, if *A.* refuse to name the price, and die before he has done so, the contract is absolutely void; for the sale being upon a condition precedent, no property vests in the vendee till the condition is performed. And if the condition become impossible by the act of God, or the person who was to name the price, the contract is at an end³; for, till the price is agreed upon, we may recollect there is no sale. But though no certain price be agreed upon when the contract is entered into, yet if the parties settle between themselves some method

¹ Kit. 181. *a.*² Ibid.³ Co. Lit. 206. *b.*

by which it may be ascertained at a future period, the maxim *id certum est, quod certum reddi potest*, applies, and the price, when so settled, shall relate to the original contract.¹

Upon this subject, we shall find a great similarity between the civil law and the law of England; thus Justinian², reciting that it had been doubted, "*si inter aliquos ita convenerit, ut quanti Titius rem æstimaverit, tanti sit emptæ*;" whether this should be considered as a sale or not, says, "*Sed nostra decisio ita hoc constituit, ut quoties sic composita sit venditio, quanti ille æstimaverit, sub hac conditione staret contractus: ut si quidem ille, qui nominatus est, pretium definierit; tunc omnimodo secundum ejus æstimationem, et pretium persolvatur, et res tradatur, et venditio ad effectum preducatur; emptore quidam ex empto actione, venditore ex venditio agente. Sin autem ille, qui nominatus est, vel noluerit, vel non potuerit pretium definire; tunc pro nihilo esse venditionem, quasi nullo pretio statuto.*"

So both the Roman law³, and our own⁴, recognise sales upon condition that the thing sold pleases the vendee upon trial or view; as, if *A.* sell corn to *B.*, upon condition that *B.*, upon view, is satisfied with it; if *B.*, when he sees first the corn, approve or disapprove of it, the bargain is complete or void; and if *B.* afterwards change his mind, he cannot annul or affirm the contract in contradiction to his first declaration, made upon view of the corn⁵; but if the bargain be, that *A.* shall give *B.* ten pounds for such a wood, if he like it upon view thereof, and a day be agreed upon for viewing it, if *A.* declare his like or dislike before the day, and yet

¹ Kit. 181. a.

² Inst. l. 3. tit. 24.

³ *Ibid.*

⁴ Plowd., 6. b. Noy's Max. c. 42.

⁵ Bro. Abr. tit. Cont. 27. 1 Roll. Abr. 449. l. 21.

if he agree to take it at the day, the bargain is perfect.¹ (z)

To this head of conditional sales, may also be referred that species of contract where goods are delivered by one tradesman to another, upon what is termed *sale or return*; that is, where a wholesale dealer delivers to a shopkeeper a quantity of goods at a certain price, to be paid for, if sold by the vendee, in a specified time; but if not sold, to be returned to the vendor. This, it will be seen, is a contract of sale which depends for its completion on the condition of the resale by the vendee, and till the condition performed no property vests in

¹ Noy's Max. c. 42. 1 Roll. Abr. 449. 1. 25.

(z) Under a contract to purchase 300 tons of Campeachy logwood, to be of a real merchantable quality, and such as might be determined to be otherwise by impartial judges to be rejected; the vendee is bound to take at the contract price, so much of the wood tendered as turns out to be of the sort described, although it appeared at the time that a part, which was afterwards ascertained to be 16 out of 300 tons, was of a different and inferior description. *Graham v. Jackson*, 14 East, 498. And where a broker sold goods on a Saturday, upon the terms that "the quality was to be approved of on Monday," and the buyer did not renounce the contract until after Monday, it was held that until that time, the contract was conditional, and that after then it was absolutely binding on both parties. *Humphries v. Carvalho*, 16 East, 45. And in a very strong case, where a party by letter offered to sell to another certain specified goods, upon receiving an answer by return of post, but owing to a misdirection of the letter, the answer notifying the acceptance of the offer, did not arrive until two days after the regular time, after which, but before the answer did arrive, the goods were sold to a third person; it was held, that this was a contract binding the parties from the moment the offer was accepted, and that an action would lie for not completing the contract, the delay in the acceptance of the offer, having arisen from the mistake in the direction of the letter by the vendor. *Adams v. Lindsell*, 1 B. & A. 681.

such conditional vendee; for, though it may appear, that by the delivery of the goods at a specified price, the sale was complete, and the agreement for the return a substantive independent contract, yet it cannot be considered in that light, inasmuch as the price, though fixed at the time of the delivery of the goods, is so fixed with reference to the conditional sale, and is more properly an agreement for a certain price *in futuro*: the language of such a contract is this; the wholesale dealer says — “ I will deliver to you a quantity of goods, which, *if* you meet with a customer for them, shall be considered as sold to you at such a price.” — Upon the resale then, the condition is performed, and the contract for the first sale is complete. But though, whilst the goods remain unsold in the hands of the conditional vendee, he has no property in them, *i. e.* no absolute property, a qualified property he has certainly as bailee, yet they will pass by assignment under a commission of bankrupt against him, as goods in his possession, order, and disposition, under the stat. 21 Jac. 1. c. 19, § 11.¹ (a) which shows that the conditional vendee is not considered as the factor of the owner of the goods; for if so, they would not have vested in the assignees under the commission²; indeed there seems to be no distinction between these agreements for the delivery of goods on sale or

Livesay v. Hood, 2 Camp. 83.

¹ *Scott v. Surman*, Willes, 400.

(a) This statute has been repealed by the new bankrupt act, 6 G. 4. c. 16., which is to take effect on the 1st of September, 1825, but has been re-enacted in that statute § 72., with so little alteration with regard to the subject under consideration, that the same will be law when that act comes into operation.

return, and the case of riding a horse upon trial, with an understanding that if he suits he is to be taken at a certain price. (b) But if goods be sold to a trader, with a proviso that in case of bankruptcy the vendor may take them back, such a condition is void under 21 J. 1. c. 18. § 11., if the goods are in the order and disposition of the bankrupt.¹

¹ *Holroyd v. Gwynne*, 2 Taunt. 176.

(b) Where goods are delivered upon the terms of *sale and return*, and the person receiving them does not return them in a reasonable time, the contract becomes absolute, and the value of them may be recovered in an action for goods sold and delivered. *Bailey v. Gouldsmith*, Peake, 56.

SECT. IV.

Of Delivery.

As delivery and payment are inseparable incidents to all sales, they perhaps cannot be more properly arranged than in this chapter, which proposes to treat of sales in general: this section then will be devoted to the consideration of what is in law deemed a sufficient delivery of goods sold to entitle the vendor to the price.

In commenting on that branch of the statute of frauds which relates to the contract of sale, this subject was unavoidably touched on, but the decisions collected in that part of the work, are only such as arose upon or out of the statute, and may therefore be considered as a distinct class of cases from those detailed in this section.

In the infinite number of transitions from hand to hand, of which property is susceptible in the mercantile world, very few sales are perfected by actual delivery of the thing sold; such delivery of those bulky articles which are the subject of a very great proportion of sales amongst merchants, would indeed be exceedingly inconvenient, and in many cases impossible; a method has, therefore, been contrived, to remedy this inconvenience, by substituting a *constructive* for an *actual* delivery: thus, the delivery of the key of a warehouse in which the goods are lodged¹; or the name of the vendee being wrote, by his direction, on the article sold²; the making goods up to be delivered, or otherwise separating them from a larger quantity of which they formed a part, with a view to delivery³; the vendee, by the consent of the vendor, dealing with the property as his own⁴ (c); the vendor, (after a sale), receiving warehouse rent for the thing sold, which, by the desire of the vendee, remains in the vendor's warehouse⁵; or the request of the vendee to keep a horse, sold to him by a stable-keeper, at livery, though the horse be not actually moved out of the stable⁶; have all been

+ Pot. propriety
Contrary to this
except in the
case of bulky
articles. See
No. 205. -

1. Pot. Propriet
No 199. con-
sists exactly.
T. G. S. B. ff. Le
eq. rer. dom.

Pot. 202. Where a
wood merchant
sells a pile of
wood stands
in his yard,
pointing it out
with his finger
to the vendee
is a sufficient
delivery.

¹ *Chaplin v. Rogers*, 1 East, 194.

² *Hodson v. Le Bret*, 1 Camp. 235.

³ Keilw. 77. pl. 25. Lord Loughborough in *Lickbarrow v. Mason*, 1 H. Black. 363.

⁴ *Chaplin v. Rogers*, 1 East, 194.

⁵ *Hurry v. Mangles*, 1 Camp. 462.

⁶ *Elmore v. Stone*, 1 Taunt. 408.

(c) Where the vendee by the consent of the vendor, deals with the goods as his own by selling them, the delivery is complete; for after a resale the vendor cannot bring an action for goods bargained and sold. *Here v. Milner*, Peake, 42. Although, in a subsequent case, it was said, that the resale was no bar to the action, although it might perhaps be considered as a wrongful conversion. *Mortens v. Adcock*, 4 Esp. 251.

construed to be evidence of a delivery, so as to enable the vendor to maintain an action of *indebitatus assumpsit* for goods sold and delivered.

So also, if a tradesman order goods to be sent by a carrier (*d*), the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser, and the property is thereby changed; thus, where goods are delivered by the vendor at a common waggon office, to be forwarded to the vendee, this is a sufficient delivery to the purchaser¹, *a fortiori*, if delivered

¹ *Dutton v. Solomonson*, 3 B. & P. 582.

(*d*) And where the order was in these words, "instead of sending the goods by way of Bristol, where many things you have sent me have been detained, send them by land carriage;" and the goods were sent by the only land carrier, and were lost: it was held that the delivery to the carrier was a complete delivery to the purchaser. *Vale v. Bayle*, Cowp. 294.

But a tradesman who has received an order to forward goods by a common sea carrier, does not sufficiently perform the order, by depositing the goods at the carrier's receiving-house, with directions for them to be forwarded to their place of destination, if the goods, being much above the value of 5*l.* (to which the carrier's liability was notoriously limited), were not specifically entered and paid for accordingly; for such tradesman has an implied authority, and it is his duty to pay any *extra charge* necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it; and in case of the non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the tradesman cannot recover the value of the goods, against the person from whom he received the order, for the delivery was not complete. *Clarke v. Hutchins*, 14 East, 475. Although the necessity for complying with the terms of the carrier's notice may be dispensed with by the purchaser, if goods have been previously and usually sent without a special entry and payment; in which case, a delivery to the carrier, without such special entry, would be sufficient to charge the purchaser. *Cothay v. Tute*, 3 Camp. 129.

to a carrier, named by the vendee¹: so delivery to a wharfinger (e); as, where A. in London², received an order from B., living near Bristol, to send goods to him, by any conveyance which would reach Bristol, informing B. when he sent them, that he might know when to expect them; A. sent the goods to a wharf from which vessels for Bristol sailed, and informed B., as he was told at the wharf, that the goods would go by the ship *Commerce*; in fact, the goods were not sent by the *Commerce*, which happened to be fully laden, but some time after were sent by another vessel. B., after the arrival of the *Commerce* at Bristol, without the goods, made no further inquiry for them, and A. did not know, till after he had required payment for the goods, that they had been sent by another ship, which he then communicated to B. Upon this case it was held, that the wharfinger was the agent of the vendee, and that by a delivery to him the property was changed, and the vendor entitled to the price of the goods. (f)

¹ *Dawes v. Peck*, 3 Esp. 14. 8 T.R. 530. S.C. *Harwood v. Lester*, 3 B. & P. 617.

² *Cooke v. Ludlow*, 2 New R. 119.

(e) But a mere delivery by the seller, at a wharf to an unknown person there, (although it is the wharf at which he had, on former occasions, delivered goods for the same purchaser), is not sufficient to charge the purchaser; as the delivery should be made to some person authorised to receive the goods, or they should be booked. *Buckman v. Levi*, 3 Camp. 414.

(f) The consignor is bound to advise the consignee of the shipment of the goods in all cases, except where in former transactions between the parties, the consignee has acquiesced in the omission of advice. *Goom v. Jackson*, 5 Esp. 112.

So, if a person abroad order goods from a merchant in London, the delivery is complete as soon as the goods are shipped : thus,

In an action on a policy of insurance upon goods¹ by the ship *Two Friends*, from London to Charleston, the defendant pleaded the general issue to all, except twenty pounds fourteen shillings and sixpence, and as to that, a tender.

It was admitted that the defendant had subscribed the policy for one hundred pounds, and that a loss had happened of seventy-six pounds fourteen shillings and sixpence, per cent.

As a discharge for fifty-six pounds, the defendant put in the record of a cause in the Lord Mayor's court, wherein one George Baker was the plaintiff, Eliza Huxham was the defendant, and Samuel Smith the garnishee. From this it appeared, that upon a judgment *quod habet*, Smith the defendant had been ordered to pay fifty-six pounds of the monies of Miss Huxham, in his hands, to Baker, and that this was an acknowledgment of satisfaction regularly entered.

Park, for the plaintiff, contended, that the defendant was bound to prove that Baker had a debt of fifty-six pounds due to him from Miss Huxham, which arose within the city of London ; and cited *Palmer v. Hooke*, 1 Lord Raymond, 727., as an authority in point.

Lord Ellenborough thought the judgment was *prima facie* evidence that the debt arose within the city ; but, it being the record of an inferior court, His Lordship said he would admit proof to the contrary.

A witness then stated, that Miss Huxham was a milliner at Charleston, and had ordered goods of Baker, a

¹ *Huxham v. Smith*, 2 Camp. 19.

shopkeeper, in Newgate Street, to be delivered on board a ship in the river Thames; that they were sent according to the order; but whether the ship which received them, then lay within the bounds of the city, the witness could not tell.

Lord Ellenborough.—That is immaterial; there was a delivery as soon as the goods were put in a course of conveyance. The debt certainly arose within the city, and might be sued for in the Mayor's Court. And again, where

The plaintiff¹ had shipped goods on board the *Mercurius*, to be carried from London to Tonningen. The goods were expressed in the bill of lading to be shipped "by order and on account of Hesse and Co. of Ham-burgh."

Before the *Mercurius* arrived at Tonningen, that place was declared in a state of blockade, and she was ordered by an English frigate to return home. On her arrival in the Thames, the captain, for the purpose (as alleged) of getting rid of the cargo, and setting the ship at liberty to proceed on another voyage, made an affidavit that he believed the cargo to be Danish property. In consequence of this, the goods in question were unloaded by an order from the Court of Admiralty, delivered into the custody of the admiralty marshal, and afterwards libelled as lawful prize to his Majesty. However, by a decree of the Court, they were at last restored to the plaintiff. The action was brought against the defendant as owner of the *Mercurius*, to recover damages for the injury the goods had suffered, and the expense the plaintiff had incurred by the proceedings in the Court of Admiralty.

¹ *Brown v. Hodgson*, 2 Camp. 36.

It was objected by Park, for the defendant, that at all events, this action could not be maintained by the present plaintiff, who had no property in the goods. The bill of lading stated them to be shipped by order and on account of Hesse and Co. Therefore the property vested in these persons the moment the goods were put on board the *Mercurius*; and for this he cited *Daves v. Peck*, and *Dutton v. Solomonson*.

The Attorney General, *contra*, took a distinction between goods sent from one part of England to another, and goods sent from England to a foreign country. In the former case, a delivery to the carrier was a delivery to the consignee; but in the latter, the risk was still the consignor's till the goods reached their destination. If the goods arrive safe, they are to be paid for; *aliter*, if they do not. But, *per*

Lord Ellenborough, The goods are shipped by order and on account of Hesse and Co. I can recognize no property but that recognized by the bill of lading. This action cannot be maintained. (g)

A written order given by the vendor of goods to the purchaser, directing the person in whose care the goods are to deliver them, is a good delivery.

(g) And in an action for the price of a quantity of brandy and rum, delivered by the plaintiffs to a carrier to be conveyed to the defendant, and which, after they came into the defendant's hands, were seized and condemned by the excise for being under the legal proof; it was set up as a defence, that as the spirits were legal proof at the time they were delivered to the carrier, and as he was to be paid his carriage by the plaintiffs, that the goods were at the risk of the plaintiffs whilst in the hands of the carrier, who being paid by them must be considered as their agent. But Lawrence J. said, that the mode in which the carrier was to be paid made no difference, as the plaintiffs by paying him did not become the insurers of the spirits while in his hands; and that the moment the goods were delivered to the carrier the property vested in the defendant. *King v. Meredith*, 2 Camp. 639.

Action on the case¹ for the non-performance of a contract. Plea, general issue.

The case was, that the plaintiff on the 26th of September, being at the house of the defendant, the defendant told him that he had a quantity of rice to sell, but there was no evidence to prove any contract made at that time. The plaintiff produced an order on Bennet and Co., to deliver to him twenty barrels of rice, which was signed by Keeves; and a witness proved that Keeves had told him, that he had sold twenty barrels of rice to Mr. Searle, at 17s. *per cwt.*; and that he was a fool for selling it so soon, as the price of rice had risen.

The plaintiff then proved the delivery of the order for the rice to the warehouseman of Bennet and Co.; and that the rice not being then removed, Keeves, on the 2nd of October, countermanded the delivery to Searle, the plaintiff, who sent for it on the 10th of October following.

It was objected, that this contract was not evidenced as directed by the statute of frauds; but,

Eyre C. J. said, The statute does not attach where there has been a delivery of part of the thing sold; in this case there has been a delivery of the whole. Keeves, the defendant, gave an order for the delivery upon Bennet and Co., in whose possession the rice then was.—The plaintiff accordingly had a verdict.

Trover for six hundred casks of butter.²

The bankrupt, an Irish provision-merchant, in December, 1807, bought the goods in question, which were then lying in the warehouses of the defendants, who were wharfingers in the Borough. Along with

¹ *Searle v. Keeves*, 1 Esp. 598.

² *Harman v. Anderson*, 2 Camp. 243.

the invoice, the bankrupt received from the sellers an order to deliver the goods, which he lodged with the defendants. The defendants thereupon transferred the goods in their books to his name, and actually debited him with warehouse rent. Immediately after the goods had been so transferred, he became insolvent, and the sellers gave the defendants notice to hold the goods on their account. A commission of bankruptcy being sued out against the bankrupt, the plaintiffs, as his assignees, demanded the goods of the defendants, but they delivered them back to the sellers.

The Attorney General, for the defendants, argued that they were justified in doing so, on the ground that the seller's right to stop *in transitu* subsisted at the time of the insolvency. And that the goods remaining with the wharfingers, could not be considered as delivered to him.

Best Serj., *contra*, relied on *Hurry v. Mangles*.

Lord Ellenborough C. J. "The goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage *in transitu*. *From that moment the defendants became trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands.* The payment of rent in these cases is a circumstance to show on whose account the goods are held; but it is immaterial here, the transfer in the books being of itself decisive. I am clearly of opinion, that the assignees are entitled to recover." Verdict accordingly. (*h*)

(*h*) And where a warehouseman or wharfinger makes such transfer in his books, or accepts a delivery-order, he in a manner attorns to

In the ensuing term, the Attorney General expressed his acquiescence in the direction of the judge at Nisi Prius; but moved to reduce the damages, on an affidavit, stating, that as to one parcel of the butter, no transfer had been made in the defendant's books to the bankrupt, before the bankruptcy. In respect to this parcel, the facts were, that the bankrupt having received the delivery-note from the vendor, sent it to the defendants, in whose warehouse the goods were lying; and that they neither made any transfer in their books to his name, nor did any thing to testify that they accepted the delivery-note, or held these goods on his account.

But the Court held, that after the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser, the delivery-note being sufficient, without any actual transfer being made in their books, and as between vendor and vendee, the delivery was complete; and, accordingly, a rule to show cause was refused. (i)

So, as between the buyer and seller, the sale of a part of a large quantity of the article sold, remaining in

the vendee, and cannot afterwards dispute his title; although, as between the vendor and vendee, the sale may not have been perfected according to the usage of trade. *Stonard v. Dunkin*, 2 Camp. 344.

(i) The delivery is complete as soon as the vendor gives the usual order to the warehousekeeper, although there is an usage of trade (as in Liverpool), that if goods are lying in a warehouse at the time when they are sold, the vendor pays rent for them for two months, if the vendee suffer them to remain there so long. *Greaves v. Hepke*, 2 B. & A. 131. But, where an agent of the vendee had bought goods, which were delivered to the vendee's packer, and attached by his creditors, it was held, that the property did not pass to the vendee, he having countermanded the purchase by letter to his agent, dated before such delivery, but not received until afterwards. *Sakie v. Field*, 5 T. R. 21 L.

the possession of a third person, is complete by the delivery of a note specifying the quantity sold, (which is admitted by such third person by writing and signing an acceptance of the order,) although the specific thing sold was never severed from the bulk.¹

But the mere act of packing goods sold, in cloths belonging to the vendee, is no delivery.

Thus, in an action² for goods sold and delivered, a verdict was found for the plaintiff, with liberty for the defendant to move for a new trial, or a nonsuit, in case the Court should be of opinion, on the report of the evidence, that the action could not be maintained.

The facts, as reported by Mr. Justice Ashurst, were, that the plaintiff had agreed to sell a quantity of wool to the defendant, that a shilling earnest was paid to bind the bargain, that the wool was packed in cloths furnished by the defendant for the purpose, and left at a hovel belonging to the plaintiff, and that the defendant was to send his waggon in a few days to take it away; but while the defendant's servant was weighing and packing it, and proposing to the plaintiff to fix the time when the waggon should come, the plaintiff declared, that "it should not go off his premises till he had the money for it."

The Court were so clearly of opinion, that this did not amount to a delivery, that they stopped the counsel for the defendants, and made the rule absolute for a nonsuit.

In this case, it was said by Mr. Justice Buller, that in questions of this sort, the usage of trade is resorted

¹ *Whitthouse v. Frost*, 12 East, 614.

² *Goodall v. Skelton*, 2 H. Black. 316.

to, to show whether there has been a delivery or not ; as in the case of wharfs and the like. (*k*)

It has been held, that where several articles were ordered at the same time, though at separate and distinct prices, and forming one gross contract, the vendor cannot, by a delivery of some of the articles, entitle himself to the price of them separately, as in the case of a separate contract for each article. (*l*) But if the vendee accept any one article so delivered, he thereby estops himself from contending that the contract

(*k*) By the usage of trade, the warrants of the West India Dock Company, are equally negotiable with bills of lading, and when indorsed for a *bona fide* consideration, are deemed equivalent to a delivery of the goods in the company's warehouses ; therefore, where a broker had obtained warrants from B. by a fraudulent payment, and had sent them into the market, where they were purchased by the broker of A., who paid for the goods on the receipt of the warrants, it was held, that A. might maintain trover against B., as the transfer of the warrants by his broker was a constructive delivery of the goods, so as to defeat B.'s right of stopping them *in transitu*. *Zwinger v. Samuda*, 1 Moore, 12. *Lucas v. Dorrien*, 1 Moore, 29.

And in another case, where A. had received a dock delivery order, for goods entered in the books of the West India Dock Company in his name, which, upon selling the goods to B., he indorsed and delivered to him ; B. sold the goods on credit to C., and delivered to him the order : it was held, that on C.'s insolvency, A. could not take possession of the goods, although they had continued in his name, and the order had not been lodged with the Dock Company, because the act of indorsing and delivering the order, the delivery by A. was complete. *Spear v. Travers*, 4 Camp. 251. And in a very late case, it was held, that the delivery of a dock warrant, indorsed for a valuable consideration, would pass the property in goods, as such is the usage of merchants, which has prevailed as long as it has been capable of prevailing. *Keyser v. Suse*, 1 Gow. 58.

(*l*) As, where there was an agreement to deliver a certain quantity of a given commodity by a certain time at a fixed price, and the seller having delivered part, which was accepted, brought an action for the price before the time for the delivery of the remainder had expired, it was held, that the contract was entire, and the plaintiff had no right to bring an action until the whole quantity was de-

was entire; and, consequently, he is liable to pay for such articles as are delivered.¹

Before we take leave of this branch of the subject, it may be proper to observe, that in all those cases where goods are delivered to wharfingers, carriers, &c., where it is said the delivery is complete, and the property changed, it must be understood, however, to be subject to the vendor's right to stop *in transitu*; *aliter*, where the goods have actually come to the hands of the vendee, as we shall see when we come to treat of stoppage *in transitu*. (m)

¹ *Champion v. Short*, 1 Camp. 53.

livered. *Waddington v. Oliver*, 2 New Rep. 61. *Walker v. Dixon*, 2 Stark. 281. *acc.* And where an agent had sold two horses belonging to different persons at an entire price to one purchaser, and warranted both horses sound; it was held, that the buyer could not sever the contract, and support an action against one of the vendors for the unsoundness of his horse, for the contract was entire. *Symonds v. Carr*, 1 Camp. 361.

(m) Whilst treating of the delivery of goods, it may be proper to remark, that if the buyer neglect to take them away within a reasonable time after notice, the seller may charge him with warehouse rent, or if he be prejudiced by the delay, he may bring an action for not removing them, but he cannot re-sell them. *Greaves v. Ashlin*, 3 Camp. 426. Although the contrary is laid down in the case of *Langfort v. Tyler*, 1 Salk. 113.

SECT. V.

Of Payment.

It has already been observed, that where no time for payment is specified in the contract of sale, the money

is demandable immediately upon the delivery of the goods¹, but where one agrees to deliver certain goods at a certain price, in a limited time, he cannot demand payment till the whole of the goods are delivered. As, where it² appeared, that on the 10th of September, 1804, A. agreed with B. to sell him one hundred bags of Kent hops, merchantable, of the growth of 1804, at fifty-six shillings *per cwt.*, to be delivered on or before the 1st of January, 1805, as it might be agreeable to the plaintiff. That on the 12th of December twelve bags were delivered, and on the same day, or the next, payment thereof was demanded, which being refused, a writ was sued out on the 13th of December. In an action for goods sold and delivered, brought to recover the price of these twelve bags, tried before Sir James Mansfield, C. J., at the Guildhall sittings after Trinity term, 1805, the plaintiff was nonsuited, his Lordship being of opinion, that the plaintiff, having agreed to deliver one hundred bags of hops by a particular day, was not entitled to bring an action upon delivery of a part of the goods.

It was moved to set aside the nonsuit, on the ground that as the plaintiff was at liberty to deliver the hops at such times as he pleased before the 1st of January, and as no time was stipulated for payment, the defendant was bound to pay for them as they were delivered.

The Court, however, were clearly of opinion, that the contract was entire, and could not be split; and that the plaintiff, therefore, had no right to bring an action until the whole quantity was delivered, or until the time for delivering the whole had arrived.

¹ Page 3.

² *Waddington v. Oliver*, 2 New R. 61.

And it has been held no waiver of the vendor's right to be paid for goods on delivery, that he allowed the purchaser to carry away a part of the goods without being paid for them ; as, where it appeared ¹ that wood had been sold, to be paid for on delivery by a bill at two months ; that the defendant had permitted the plaintiff to carry away a part of it, without receiving any bill ; but that he had refused to let him have the remainder till it should be paid for according to the terms of the contract. It was held, that this was only a dispensation *pro tanto*, and that the vendor was entitled at any time to stand on his right to be paid according to his contract. (n)

We have seen, that where a person takes a bill of exchange, or check upon a banker, payable at a future day, in payment for goods sold, that he cannot sue for the price of his goods, until the expiration of the time which such bill or check has to run, unless it turn out that such security was good for nothing : it therefore becomes necessary, for us to consider in what cases such bill or check is to be considered as a payment, or when the party is at liberty to treat it as a nullity, and sue for his debt in an action for goods sold and delivered.

When the bill, note, or check, is ascertained to be a void or invalid security, it is not considered as a payment, and consequently the vendor may resort to his

¹ *Payne v. Shadbolt*, 1 Camp. 427.

(n) Upon a sale of goods at six or nine months' credit, the purchaser by not paying at the end of six months, makes his election to take credit for the nine months, and there is no debt to support a commission of bankruptcy until the nine months are expired. *Price v. Nixon*, 5 Taunt. 338.

original debt ; (that is, where the security was accepted as an indulgence to the vendee, and not in consequence of a contract for credit at the time of the sale, in which case, we may remember, the vendor must wait until the time of the credit expires, even though the bill agreed to be given in the mean time proves to be waste paper.¹ (o)

This² was an action of assumpsit for goods sold and delivered. The defence relied upon by the defendant was, that the plaintiff, in discharge of the bill, which was for millinery goods furnished to the defendant, had taken three promissory notes of one Finlay, payable at the house of a Mr. Browne, and had given the defendant a receipt to that effect ; the notes had been sent to Browne, and he was applied to respecting the payment ; in answer to that application he said he knew Finlay, but that he had no effects of his in his hands ; nor could he pay the notes unless he had : the notes were thereupon returned in a letter to Finlay, informing him that they were so returned as not being likely to be paid.

Upon this case being made, it was objected by the counsel for the defendant, that it appeared the notes had been returned before they were payable ; and that the plaintiff having taken them in discharge of his debt, for goods sold, could not maintain an action on his

¹ Ante, 59.

² *Stedman v. Gooch*, 1 Esp. 3.

(o) And the taking of bills in payment from the ostensible partner in a firm, is not a discharge to dormant partners, unless they are satisfied ; for if they are dishonoured, the creditor may resort to all persons primarily liable to him, and may sue the unknown partner for the debt when he is discovered. *Robinson v. Wilkinson*, 3 Price, 538.

original debt, until an actual default in the payment of these notes when they became due; and that the plaintiff should not be allowed to judge of the probable or improbable ability of the party to pay at a future day. But Lord Kenyon over ruled the objection. He said, that to this effect the law was clear, that if, in payment of a debt, the creditor is content to take a bill or note, payable at a future day, that he cannot legally commence an action on his original debt until such bill or note becomes payable, or default is made in the payment; but then, if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it.

So, where the bill becomes of no value from the insolvency of the drawee, as in the following case:

This¹ was an action of *assumpsit* for goods sold and delivered. The evidence of the plaintiffs below was to the following effect: That on the 19th of January, 1793, Kewley and Co., who were merchants at Liverpool, by Messrs. Grieves and Dennison, their brokers, sold and delivered to G. and H. Brown, who were also merchants at Liverpool, forty-two hogsheads of coffee, to be paid for in two months, by a bill at two months' date; that this coffee was purchased by G. and H. Brown on the joint account of themselves and J. P. Richard, also a merchant in Liverpool; that on the 7th of February, 1793, G. and H. Brown, on behalf of themselves and J. P. Richard, delivered to Kewley and Co. a check on Caldwell and Co., bankers at Liverpool, directing them,

¹ *Brown v. Kewley*, 2 B. & P. 518.

two months after date, to pay to Kewley and Co., a bill at two months for the amount of the goods, which check was indorsed by the plaintiffs below, and paid by them into the banking-house of Caldwell and Co., who entered it short in the account of Kewley and Co.; that G. and H. Brown on their partnership account, and J. P. Richard on his own account, and Kewley and Co. on their partnership account, respectively dealt with Caldwell and Co. as bankers, and that the general course of business between Caldwell and Co., and most of their customers, was to settle accounts on certain quarterly days: when they advanced bills for their customers, or received bills for them, they entered the whole amount in their books as bills; but on the quarterly days, they debited their customers with the whole amount of bills advanced to or for them, crediting them at the same time for interest from such day to the day when the bills would become due, and crediting their customers for the whole amount of bills paid in by them; debiting them for the interest in like manner, and when a check was paid in for a bill to be drawn at a future day, they calculated and allowed interest on the next quarterly day, to the time when such bill, if drawn, would become payable: that the account between Kewley and Co. and Caldwell and Co. had been settled only six times between May, 1789, and March, 1793; but that each of those settlements took place on a quarterly day: that on the 18th of March, 1793, Caldwell and Co. became bankrupts, a quarterly day having intervened between the payment of the check into the house of Caldwell and Co., and their bankruptcy, upon which last quarterly day no settlement of accounts between Kewley and Co. and Caldwell and Co. took place, nor was the amount of the check ever carried

out as cash, or any calculation of interest made thereon till after the bankruptcy : that when the check was paid into the banking-house of Caldwell and Co., there was a balance of fifty-one pounds eleven shillings in favour of Kewly and Co., which was much overdrawn before the bankruptcy of Caldwell and Co., without any other addition to the credit side of the account than the check in question. — Upon this evidence, the learned Judge (Heath) who tried the cause, held that the delivery of the check to Kewley and Co., and their receipt of the same, and the indorsement over to Caldwell and Co. was not a legal payment or satisfaction ; the plaintiffs below accordingly had a verdict, whereupon a bill of exceptions was tendered, and afterwards sealed by the learned Judge.

One of the errors assigned was, upon this direction, given to the jury ; but the court of error, after hearing the case fully argued, and taking time to consider their judgment, affirmed the judgment below. (*p*)

Where a bill or check is given in payment, and afterwards lost by the payee, such bill or check will be so

(*p*) If the seller of goods take notes or bills for them, without agreeing to run the risk of their being paid, and the notes turn out to be worth nothing, it is not a payment. *Owenson v. Morse*, 7 T. R. 64. But in a case, where A. sold goods to B., for which the latter was to pay by a bill at three months, and B. gave to A. a check on his bankers, (who were also the bankers of A.) requiring them to pay A. on demand in a bill at three months, and A. paid the check into the bankers' hands, and took no bill from them, but the amount was transferred in the bankers' books from B.'s account to A.'s with the knowledge of both parties ; and the bankers having failed before the bill intended to have been given would have become due, it was held that it was a valid payment, and that A. could not recover the value of the goods against B. *Belton v. Rickard*, 6 T. R. 189.

far considered as a payment; as to protect the vendee from any action for the value of the thing sold, where the vendor refuses to indemnify the vendee against his liability on the bill or check.¹ And it would seem that the same rule would prevail, even had the vendor offered sufficient and unexceptionable indemnity, if the bill or check be indorsed, or payable to bearer.² (q)

And if a debtor is directed by his creditor to remit money by the post, and it is lost, the creditor must bear the loss³; but in such cases, the person remitting should deliver the letter at the post-office, and not to a bell-man in the street.⁴ (r)

¹ *Bevan v. Hill*, 2 Camp. 581.

² *Pierson v. Hutchinson*, *ibid.* 211.

³ *Warwick v. Noakes, Peake*, 67.

⁴ *Hawkins v. Rutt*, *ibid.* 186.

(q) Although generally, if a creditor elect to take a bill or note for which a third person is liable, in preference to money from his debtor, he must abide by the hazard of the security; but where a debtor's agent offered to pay the creditor's agent in bank notes, and the latter requested to have a check as more convenient to himself, and the check was dishonored; it was held that the debtor was not discharged, as the check of the agent must be considered as his own. *Everett v. Collins*, 2 Camp. 515. And a purchaser of goods, to be paid for by a bill on his agent who has no convertible funds in his hands, is not discharged by a renewal of the bill from the agent, without notice to the purchaser. *Clark v. Neale*, 3 Camp. 411.

(r) In order to render the work as complete as possible upon the subject of payment, it may not be amiss in this place, to shew together the leading cases which have been decided. I. Upon payments made in a specific manner. II. Upon payments made to agents, showing under what circumstances such payments will be considered as binding upon their principals; and III. Upon payments made whilst there are different unsettled accounts between the parties. I. As to specific payments, it has been held, that when goods were delivered under an agreement to take a *specific parcel* of copper halfpence in payment, a delivery of such copper will be a good bar to an action for the value of the goods, although, in fact, the greater

Upon the question whether interest ought to be allowed upon a demand for goods sold and delivered,

part of it was counterfeit money. *Alexander v. Owen*, 1 T. R. 225. And that where A. in the country, directed B. to pay money into a London banking-house for A.'s account, who had no account with the house but through a country banker, that a payment to the credit of A.'s account with the country banker would discharge B. *Breed v. Green*, Holt, 204.

II. Upon the subject of payments made to agents, and how far those payments will bind the principals, the following cases have been decided:

1. Where the owner of goods allows his broker to sell them as a principal, the purchaser will be discharged by paying the price of the goods, to the broker. *Coates v. Lowes*, 1 Camp. 444.

2. But if before such actual payment, the purchaser receive notice from the principal not to pay the broker, and notwithstanding such notice he does pay him, the principal may still maintain an action for the price of the goods, unless the factor had a lien on the goods. *Drinkwater v. Goodwin*, Cowp. 251.

3. And if on some occasions, the principals allow their brokers to draw bills in their own names, for goods which they have sold on their account, they are bound by payments to the brokers by the purchasers. *Townsend v. Inglis*, Holt, 278.

4. Where goods were sold by a broker, for a principal not named, upon terms as expressed in the bought and sold notes delivered over to the respective parties by the broker, of "payment in one month, money," the buyer is discharged by payment to the broker within the month, although the payment be made by a bill of exchange, accepted by the buyer, and discounted by him within the month. *Favenc v. Bennett*, 11 East; 86.

5. If a person take a security of the agent, unknown to the principal, and give the agent a receipt as for money due from the principal, on the faith of which, the principal deals differently with his agent, the principal is discharged, although the security fail; but the principal must show that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in time. *Wyatt v. Hertford* (Marquis), 3 East, 147.

6. After a sale through brokers upon a certain credit, without disclosing the principal, payment to the brokers upon other terms of credit, although equivalent in the usage of trade, is not available against the assignees of the principal. *Campbell v. Hassell*, 1 Stark. 233.

there seems to be a conflict of authorities. In *Pincock v. Willer*¹, which was an action for goods sold and

¹ 1 Barnes' Notes, 151.

7. A tender to an agent authorised to receive money is a good tender to the creditor. *Goodland v. Blewith*, 1 Camp. 477.

8. But to do away with the effect of a tender, upon a replication of a subsequent demand and refusal, it must be proved that the demand was made by some one authorised to receive the amount, *Coore v. Callaway*, 1 Esp. 115.; and to give the debtor a discharge. *Coles v. Bell*, 1 Camp. 478. n.

III. With regard to the law upon the subject of payments, when there are different unsettled accounts between the parties, the rule is this: — That the debtor may apply his payment to whichever account he pleases; and his election in the matter may either be expressed or inferred from the circumstances of the transaction, and is binding upon the party to whom the payment is made; but where a party makes a general payment without any such direction, the creditor is at liberty to apply the payment to either account at his option. — The following cases have been decided on this rule.

1. Where a servant covenanted with his master to serve him for certain wages for three years, at the end of which time a balance remained due to him; and then entered into a fresh contract not under seal, to serve at increased wages, which continued in force for three years more, when it was found that he had received at different times more than was sufficient to cover the balance due on the former contract; it was held, that such money having been paid generally, without specifying to what account, might be applied by the servant in discharge of the simple contract debt. *Peters v. Anderson*, 1 Marsh, 238.

2. Where a party gave a bond to a banking firm, conditioned for the payment of a balance of account, and further advances, and afterwards a new partner entered the firm, who in their account charged the original debt and subsequent advances as constituting items of one entire account; it was held, that having not originally treated it as a distinct account, but blended it in the general account with other transactions, they could not sue upon the bond as for a distinct debt. *Bodenham v. Purchas*, 2 B. & A. 39.

3. A creditor who has received money without any specific appropriation thereof by the debtor, may in a court of law, ascribe his receipt to the discharge of a prior and purely equitable debt, and

delivered; the sheriff's jury, upon the execution of a writ of inquiry, allowed the plaintiff six pounds five

may sue the debtor at law for a subsequent legal debt. *Bosanquet v. Wray*, 6 Taunt. 597.

4. Where A. having a legal demand against B., and claiming also to be the equitable assignee of a debt due from B. to C., received money from B. on account, *without prejudice to such claim*; the payment was considered to be applicable to the legal debt. *Birt v. Tebbutt*, 2 Stark. 74.

5. Where a person has two demands upon another, one arising out of a lawful contract, and the other out of a contract forbidden by law, and the debtor makes a payment which is not specially appropriated by either party at the time of payment, the law will appropriate it to the debt recognised by law. *Wright v. Laing*, 3 B. & C. 105.

6. Payments made generally on account of a person, may be applied in liquidation of a balance against that person before the execution of a bond; and a co-surety cannot insist upon their being applied in exoneration of his liability on the bond, although at the time of his entering into it, he had no notice that any balance was due. *Kirby v. Marlborough (Duke)*, 2 M. & S. 19.

7. Where security had been given by a surety for goods to be supplied to his principal, and not in respect of a debt previously existing from the principal to the vendor, and payments had been made by the principal; it was inferred in favour of the surety, that these payments were intended as far as they would go, to be in liquidation of the latter account, for the circumstance of discount being claimed and allowed for prompt payment is evidence of an appropriation to a recent debt. *Marryatts v. White*, 2 Stark. 101.

8. A payment made to bankers, where the debtor has a subsisting debt, is a payment on account of that debt, and not a deposit to cover future advances. *Hammersley v. Knowlcs*, 2 Esp. 663.

9. But where two persons were in partnership as army agents, and one of them retired, and the other afterwards became bankrupt, it was held, that general payments made after the expiration of the partnership, might be applied in discharge of an old balance then due. *Brooke v. Enderby*, 2 B. & B. 70.

10. Where an obligor became indebted to the obligee, in a further sum by simple contract, and paid money without directing the application of it, the Court held that it was a payment on account of the bond, that being the older debt. *Dawe v. Holdsworth, Peake*, 64.

shillings interest.—Upon a motion to set aside the inquisition, the court were of opinion, that interest could not be allowed in any case, except upon promissory notes and bills of exchange, and would have set aside the inquisition, but it was agreed to remit the six pounds five shillings, to save the expense of a new inquiry. So in *Blaney v. Henrick*¹, it was said by Gould, Blackstone, and Nares, Justices, “that for money owing for goods sold and delivered no interest shall be allowed.” But it would seem from the report in Blackstone, that this opinion was grounded upon the circumstance of such debts not being liquidated till the jury find the value.—In *Eddowes v. Hopkins*² also, it was admitted by Lord Mansfield C. J., that by the common law, book debts do not, of course, carry interest; but subsequently, in an action for goods bargained and sold³, at a limited credit, the Court of Common Pleas refused to set aside a verdict, which included interest on the sum demanded, from the time at which the money ought have been paid, according to the terms of the contract. In future, however we may hope to find the decision upon this branch of the law more in unison, as the late learned Chief Justice of the King’s Bench, has laid it down as a general rule, “that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has

¹ 2 W. Black. 761. 3 Wils. 205. S.C.

² *Mountford v. Willer*, 2 B. & P. 337.

³ Dougl. 376.

been used, and interest has been actually made;"¹ (s) and what is here said as to payment to be made on a day certain, must be understood to refer to written contracts only, such as bills of exchange, &c.; consequently interest ought not to be allowed in an action for goods sold and delivered, to be paid for at a certain day. Thus, where goods were sold by the following contract²: "London, 9th of September, 1808. — Sold for account of Messrs. Gordon and Murphy, — to Swan, Anderson and Co., about one hundred and fifty tons of Spanish copper, at eighty four pounds *per* ton, to be received in fourteen days; *payable at six months.*" — The question was, whether interest ought to be allowed from the expiration of the six months for which the credit was given? The under-sheriff on the execution of a writ of inquiry, directed the jury that they could not give interest; a rule *nisi* to set aside the inquisition on account of a mis-direction of the under-sheriff was moved for by Taddy, who relied on *De Haviland v. Bowerbank*, and *Mountford v. Willes*. But Lord Ellenborough C. J. observed, that if interest was allowed in this case, it must be allowed in almost every action for goods sold; as it generally happens, that either by the usage of trade, or by express stipulation between the

¹ *De Haviland v. Bowerbank*,
1 Camp. 51.

² *Gordon v. Swan*, 2 Camp. 429,
12 East, 419. S. C.

(s) Abbott C. J. in a very late case, laid it down as the general rule, "that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances;" and said that it was of great importance, that this rule should be adhered to. *Higgins v. Sargent*, 2 B. & C. 348.

parties, credit is given for a specific time; and that what he said in *De Haviland v. Bowerbank*, must be taken to refer to written instruments, such as promissory notes, and bills of exchange, which are there put as examples. — Rule refused: (†)

From the rule in *De Haviland v. Bowerbank*, it would seem as if interest ought not to be allowed in an action for not giving a bill of exchange in payment for goods sold from the time when the bill, if given, would have become due, for this is a mere breach of contract, for which the party injured may maintain an action for damages in their nature unliquidated. And so far from being a contract expressed or implied to pay interest, the foundation of the action is the refusal of the defendant to enter into such a contract, by giving the bill. In *Waddington v. Bristow*¹, the Court of King's Bench refused to allow interest in an action for not performing a contract. But in a late case² which was an action for not giving a bill of exchange, pursuant to

¹ 2 New R. 360.

² *Becher v. Jones*, 2 Camp. 428. n.

(†) Interest is not recoverable in an action for money had and received, to recover the balance of an account. *Chalie v. Duke of York*, 6 Esp. 45., unless upon an inspection of the account, it appears that the usual mode of dealing between the parties, was to allow interest on the balance, and that it had been so allowed accordingly. *Nichol v. Thompson*, 1 Camp. 52. Nor is interest allowable by law on money lent generally, without an express contract, or one to be implied from the usage of trade, or from special circumstances. *Calkon v. Bragg*, 15 East, 223. Nor is it recoverable in an action for money had and received. *Tappenham v. Randall*, 2 B. & P. 467. Nor can interest accruing before an act of bankruptcy, be added to the principal sum due on a bill of exchange, so as to constitute a good petitioning creditor's debt, unless interest be specially made payable upon the face of the bill. *Cameron v. Smith*, 2 B. & A. 305.

the terms of a contract of sale, in which the defendant suffered judgment by default; after a writ of inquiry executed, a writ of error was brought, on which the judgment below was affirmed. Upon which application was made to the Court of Error, that it might be referred to the officer, to compute interest upon the final judgment, from the time of the service of the allowance of the writ of error to the affirmance of the judgment, and that the same might be added to the damages. Sir James Mansfield said, that if the bill had been given, interest must have been paid pending the writ of error, and it would be unjust that the defendant below should be placed in a better situation by not performing his contract. — The rule was granted. (*u*)

So where goods are sold and delivered upon an agreement by the vendee to pay for them by a *bill* at a certain date: as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods, brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods, upon the common count for goods sold and delivered.¹

Where a bill of exchange or note is given as a security for money, we have seen that interest is payable

¹ *Marshall v. Poole*, 13 East, 98. *Slack v. Lowell*, 5 Taunt. 157.

(*u*) In an action for not accepting a bill of exchange for the price of goods sold by the plaintiffs to the defendant, to be paid for by a bill at six months' date, a question was made, whether the plaintiffs were entitled to interest; it was held that they were, from the time the bill would have become due. *Porter v. Palsgrave*, 2 Camp. 472. And in another case, it was decided that the vendee was equally liable, although he had refused to accept the goods. *Boyce v. Warburton*, 2 Camp. 480.

from the time it becomes due. So if a man give such security, though void in point of law (as a security), yet the giving of such bill or note shows, that upon the loan, *the intention and agreement of the parties were, that the money should carry interest, if not repaid within the limited time.* — The contract remains good, though the *security* is void.¹

So where from the usage of a particular trade the intention of the parties, that a book debt shall bear interest, can be collected, interest will be allowed.²

Where debts carry interest, the jury are now directed to give interest in damages, up to the day on which judgment may be signed.³

If a promissory note be payable by instalments, with a condition, that if default be made in any of the payments, the whole sum is to become due, interest upon the whole is recoverable from the first default⁴, and in such an action, if the plaintiff merely state in his particular, that the action is brought to recover the amount of the note, interest is recoverable as incidental to the principal, though not claimed in the particular.⁵ (v)

¹ *Robinson v. Bland*, 2 Burr. 1085.

⁴ *Blake v. Lawrence*, 4 Esp. 147.

² *Eddowes v. Hopkins*. Dougl. 376.

⁵ *Ibid.*

³ *Frith v. Leroux*, 2 T. R. 58.

(v) If a purchaser pay a deposit to an auctioneer at the time of sale, in part of his purchase money, and bring an action against him to recover it back, in consequence of the vendor's not being able to make a good title, and such deposit is recovered, the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, and may recover it, on alleging the special damage in his declaration. *Farquhar v. Farley*, 7 Taunt. 592. *De Bernales v. Wood*, 3 Camp. 258. But in another case, it was held that the auctioneer was not liable for interest, although nearly four years had elapsed from the time of sale, on the ground that no demand had been made to him for the re-payment of the deposit. *Lee v. Munn*, 1 Moore, 481.

CHAPTER II.

OF THE PARTIES TO THE CONTRACT.

It is generally true, that, by the law of England, every person *sui juris*, of full age, and sane memory, may make a binding contract¹; and that though the party be a leper, removed by the king's writ *a societate hominum*, or deaf, dumb, or blind; if he have understanding and sound memory.²

But as every contract entered into with persons, in the cases excepted, is not *ipso facto* void; the degree of obligation arising from contracts made with persons of a limited capacity to contract, and in what cases such contracts are absolutely void, will be considered in the first section of this chapter: the second and third section will be appropriated to contracts made by one of several partners on behalf of the firm, and contracts made by agents, &c.

¹ Co. Lit. 42. b.

² Ibid.

SECT. I.

Of Sales by and to Females Covert, Infants, &c.

The persons of whose contracts we are about to treat under this division of the subject, may be classed as fol-

laws: 1. Femes covert. 2. Persons insensible. 3. Persons under duress. 4. Idiots and Lunatics. 5. Infants. 6. Persons attainted, &c. 7. Aliens.

I. As to femes covert. By the civil law¹ the husband and wife are considered as persons capable of distinct and separate rights, and of making separate contracts, and might sue each other as independent individuals; but by the law of England, the husband and wife are looked upon as one person², and the legal existence of the wife, is to all civil purposes, merged in that of the husband; and, consequently, generally speaking, any contract made with her is *absolutely void*.³ But though a married woman is not personally liable upon her contract, yet she may contract as the agent of her husband; but she cannot buy goods, &c. without the assent of her husband, so as to charge him with the payment⁴; yet if the goods come to the use of the husband, or his family, with his knowledge, he shall be charged⁵; as if they were brought to his house, and used there⁶; or if the wife be generally allowed by her husband to be housekeeper, or buy for him⁷, or buy necessary apparel for herself⁸, (w) or necessities for herself and family, when her husband is beyond sea⁹, or goods to carry on a trade conducted

¹ Cod. l. 4. tit. 14. 1. and see the 10th, 18th, and 19th Orations of Quintilian.

² Co. Lit. 112.

³ Perk. § 154. *Manby v. Scott*, 1 Sid. 120.

⁴ Earl of Derby's case, 2 Leon. 42.

⁵ 1 Roll. Abr. 350. c.

⁶ *Manby v. Scott*, supra.

⁷ Ibid.

⁸ 1 Roll. Abr. 351.

⁹ *Manby v. Scott*, supra.

(w) The husband is in general the proper judge of what is necessary for his wife, and is at liberty to prohibit any particular individual from trusting her, although a general prohibition to all persons whomsoever would be void.

by her during her cohabitation with the husband: in all these cases the consent of the husband is presumed, and the contract is with him through the agency of the wife¹; and therefore if the husband dissent from such acts of the wife beforehand, no such presumption can arise, and, consequently, he is not liable on contracts made with her.² But if a husband turn away his wife^(x) he gives her credit wherever she goes, and must pay for necessaries for her, though he gives notice to persons not to trust her³; but it is otherwise if she elope from the husband.⁴ And if she elope with an adulterer^(y), the husband is not liable even for necessaries, though the vendor had no notice⁵: but if

¹ *Etherington v. Parrot*, 2 Ld. Raym. 1006. 1 Salk. 118. S. C.

² *Ibid.* and *Manby v. Scott*, 1 Sid. 127, 128., and 1 Leo. 5. S. C.

³ *Etherington v. Parrot*, *supra*, and *Boltons v. Prentice*, 2 Str. 12. 14. *Harris v. Morris*, 4 Esp. 41.

⁴ *Manby v. Scott*, and *Etherington v. Parrot*, *ante*, and *Child v. Hardyman*, 2 Str. 875.

⁵ *Morris v. Martin*, 1 Str. 647., and *Mainwarring v. Sands*, 1 Str. 706.

(x) Or if he ill treat her so that it is rendered unsafe for her to live with him, and she therefore leaves his house, he is liable for necessaries supplied to her. *Hodges v. Hodges*, 1 Esp. 441. But if she leave her husband voluntarily, for any cause short of personal violence, or ill treatment such as to induce a reasonable fear of it, the husband will not be liable for necessaries furnished to her subsequently to her leaving his house. *Harwood v. Heffer*, 3 Taunt. 421.

(y) And even where the husband had himself been guilty of adultery with a woman whom he had brought home, and at the same time treated the wife with great cruelty, and turned her out of doors; after which the wife committed adultery, and then offered to return to her husband, but he would not receive her, the Court held that he was not bound to receive or support her. *Govier v. Hancock*, 6 T. R. 603. But improper and lewd conduct on the part of the wife, will not be sufficient to take away the husband's liability to provide her with necessaries, while he allows her to continue to reside with him. *Robinson v. Gretnold*, 1 Salk. 119.

after the elopement of the wife, not in an adulterous manner, the husband refuse to receive her again, his liability revives¹; and the husband is liable for necessaries for his wife, though she has separate property, if they cohabit²; but it has been said, that if the wife purchase clothes apparently beyond the quality of the husband, he is not liable³; when, however, a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is, in general, liable only for such necessaries as from his situation in life it is his duty to supply to her. But even where they are parted, if the husband has any controul over goods improvidently ordered by his wife, so as to have it in his power to return them to the vendor, and he does not return them, or cause them to be returned, he adopts her act, and renders himself responsible. (z) Again, however low a man's circumstances may be, if he allow his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived, the loss must fall upon him who connived at the deception. Whatever may be the husband's degree, he sends his wife into the world with a credit corresponding to the rank in life in

¹ *Child v. Hardyman*, *supra*.

² *Thompson v. Harney*, 4 Burr. 2177.

³ *Per Treby in Merton v. Withers*,

Skin. 549.

(z) Although a man live separate from his wife, if he allow his children to live with her, he gives her an implied authority to purchase necessaries for them. *Rawlins v. Vandyke*, 3 Esp. 250.

which, by his sanction, she affects to be placed.¹ However it is the duty of a tradesman to make inquiries before trusting a married woman who is a stranger to him.² (a) If a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liability for necessaries supplied to her, by proving a previous marriage between himself and another woman still alive; unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife.³ (b)

¹ *Waithman v. Wakefield*, 1 Camp. 121.

² *Ibid.* 122.

³ *Robinson v. Nahon*, 1 Camp. 245.

(a) It is a question of fact for the consideration of the jury, whether a tradesman who furnishes goods to a wife, gives credit to her or to her husband; for if the credit is given to her, the husband is not liable, although the wife lives with him, and he sees her in possession of the goods. *Bentley v. Griffin*, 5 Taunt. 356. Thus, where a woman residing with her husband, without his privity, ordered excessive quantities of apparel, which were supplied on her personal credit, and the payment attempted to be secured by a promissory note given in her own name, it was held, that the husband was not liable for any part of the goods, although it did not appear that he had supplied her with necessaries. *Metcalf v. Shaw*, 8 Camp. 22. And in a very late case, where it appeared that the plaintiff had in the course of two months furnished to the defendant's wife jewelry to the amount of 83*l.*, and had always, when he called upon the subject, avoided seeing the defendant, and that the goods to that amount were in no respect necessaries in the defendant's station in life; it was held, that as there was no evidence of any assent of the husband, to the contract made by his wife, an action for the price of the goods could not be maintained, and that the plaintiff ought to have made inquiry. *Montague v. Benedict*, 2 B. & C. 631.

(b) A man who holds a woman out to the world as his wife, and allows her to use his name, is liable for her engagements, although the creditor knew that the parties were not married. *Watson v. Threlkeld*, 2 Esp. 637. But a man is not liable for necessaries supplied to a woman, on the ground that he had formerly lived with her, and represented her as his wife. *Munro v. De Chemant*, 4 Camp. 215.

But to the general rule, that a married woman cannot bind herself personally, by her contract, there are many exceptions; as when the husband has abjured the realm, or is banished¹; or be transported for a limited period²; or where the husband who has been transported does not return, the term of his exile being expired^{3(c)}; in such cases the wife may contract as a *feme sole*. So, if the husband (a foreigner) reside abroad, and the wife trade and obtain credit in this country as a *feme sole*, she may be sued as such.⁴ And in a subsequent case, where the husband was a foreigner, and had gone abroad, leaving his wife in England, she was held liable for debts contracted here, though she was not separated from her husband (otherwise than by his necessary absence on the continent), had no separate maintenance, and had never represented herself as a single woman⁵; but the case is different, if the husband be an Englishman, who may be presumed to have *animus revertendi*⁶: but that presumption may be rebutted by circumstances which show that he has quitted the country without any idea of returning; in which case, the wife would be liable, as we have seen, on the old principle of the

¹ Co. Lit. 133. a. *Deerly v. Duchess of Mazarine*, 1 Salk. 116. *Jewson v. Read*, Loft, 154.

² *Sparrow v. Carruthers*, cited in 2 W. Black. 1197.

³ *Carrol v. Blencow*, 4 Esp. 27.

⁴ *De Gailon v. L'Aigle*, 1 B. & P. 8. 557.

⁵ *Burfield v. Duchesse de Pienné*, 2 New R. 380. *Walford v. the same Defendant*, 2 Esp. 554., and *Franks v. same*, ibid. 587.

⁶ *Farrer v. Countess of Granard*, 1 New R. 80., and see *Mac Namara v. Fisher*, 3 Esp. 18.

(c) And where there has been a sentence of nullity of marriage. the liability of the husband for the debts of the wife ceases from the time. *Austey v. Manners*, 1 Gow. 10. Although a woman divorced *a mens et thoro* for adultery, and living separate and apart from her husband, cannot be sued as a *feme sole*. *Lewis v. Lee*, 3 B. & C. 291.

common law, as where the husband has abjured the realm. Thus, where an Englishman had been employed in the service of the British government in a foreign country, and had lands there, and in consequence of a war between the two countries, and the cessation of his employment, sent his wife and family home, but continued to reside abroad himself; (d) it was held that the wife, not having represented herself as a *feme sole*, was not liable to be sued as such.¹ It was formerly held, that if a *feme covert* lived apart from her husband, and had a separate maintenance, she might contract and be sued as a *feme sole*², if such separate maintenance, was a *fixed and permanent* allowance³; but it is now decided, that a man and his wife cannot by agreement between themselves, change their legal capacities and characters, and that a woman cannot be sued as a *feme sole* while the relation of marriage subsists, and the husband is in this kingdom, or abroad with an intention of returning; and that, consequently, any deed of separation, though securing to the wife an ample allowance, is at law a mere nullity; though a court of equity might enforce payment of the wife's

¹ *Marsh v. Hutchinson*, 2 B. & P. 226.

² *Corbet v. Poelnitz*, 1 T. R. 5.

³ *Gilchrist v. Brown*, 4 T. R. 766.

and *Ellis v. Leigh*, 5 T. R. 679.

(d) The rule upon this subject, seems to depend on the fact whether the absence of the husband is intended to be temporary or permanent: if the former, then the wife may avail herself of her coverture; but if the latter, she is liable on her own contracts, and may be sued as a *feme sole*. Thus, it has been held, that where a husband went abroad, and left his wife, who died in his absence, that a third person, especially if he were her father, might recover from the husband, money which he had voluntarily and without the knowledge of the husband laid out in her funeral, (which was suitable to the rank and fortune of the husband). *Jennings v. Tucker*, 1 H. Black. 90.

debts out of a separate fund.¹ (e) And it seems that a woman living apart from her husband *in a state of adultery*, is liable for her own contracts, though she has no separate maintenance²; but, notwithstanding the wife has committed adultery, even though the husband separate himself from her, if he allow her to continue in the house which he had occupied, together with his children, and she bear his name, he will be liable for necessities furnished to her; unless it be

¹ *Marshall v. Rutton*, 8 T.R. 545.
Rwerts v. Hutton, 3 Esp. 255.

² *Cox v. Kitchen*, 1 B. & P. 338.

(e) Although a separate maintenance will not make the wife personally liable, yet if it be adequate and is regularly paid, it will discharge the husband from her debts, even though there is no written agreement with respect to the allowance; and the adequateness of the allowance is a question of fact for the jury. *Hodgkinson v. Fletcher*, 4 Camp. 70. and see *Holt v. Brien*, 4 B. & A. 452. Thus, where a husband and wife were separated, and the wife had a separate allowance secured to her by deed, and this fact was generally known in the neighbourhood where the husband resided; it was held, that he was not liable for necessities furnished to his wife in a strange place, where the circumstances of the separation were wholly unknown. *Todd v. Stokes*, 1 Ld. Raym. 444. And where they had lived separate for many years, she supporting herself out of her own property, and he never having been called upon during that period; it was held, that he was not liable to be sued by any person who may have given her credit even for necessities. *Lidlow v. Wilmot*, 2 Stark. 86. But he may be sued on an express promise, although made under a mistake as to his legal liability. *Hornbuckle v. Hornbury*, 2 Stark. 177.

But, if the allowance be not adequate, or is not regularly paid, the husband will be liable; and a trustee with whom the husband has covenanted by deed to make a separate provision for his wife, and who has provided the wife with necessities, may sue the husband by *indebitatus assumpsit* notwithstanding the deed, for necessities furnished to the wife after she left her husband, and he had failed to pay the stipulated allowance. *Nurse v. Craig*, 2 New R. 148.

proved that the tradesman with whom she dealt, knew, or might have known, the circumstance of the separation, and that the wife was living in adultery.¹

By the custom of London, if a *feme covert*, the wife of a freeman, trade by herself in a trade with which her husband does not intermeddle, she may sue and be sued on her contracts as a *feme sole*; and the husband shall be named only for conformity; and if judgment be given against them, she only shall be taken in execution.²

But actions upon such contracts must be brought in the city courts.³ (f)

The queen consort also may contract as a *feme sole*, and sue and be sued alone.⁴ (g)

But notwithstanding this unity of person and rights which the law annexes to the marriage state; the courts of equity adopt the principle of the civil law, and will entertain suits against a *feme covert* in respect of her separate property; and will also give relief to her against her husband, or *vice versa*⁵; so too in the ecclesiastical courts.⁶

2. Persons insensible, or labouring under an unhappy deprivation of the use of those organs by which men

¹ *Norton v. Fazan*, 1 B. & P. 226.

² *Langham v. Bewett*, Cro. Car. 69.

³ *Hetly*, 9. Litt. Rep. 61. S. C.

⁴ *Caudell v. Shaw*, 4 T. R. 361.

⁵ Co. Litt. 133. a.

⁶ *Newsome v. Bowyer*, 5 P. Wms. 37, 38. Prec. in Chan. 24.

⁷ 2 Roll. Abr. 298.

(f) It has since been solemnly determined in the Exchequer-chamber, that a *feme covert* sole trader in the city of London, is not liable to be sued as such in the courts at Westminster, and that even in the city courts, her husband must be joined for the sake of conformity. *Beard v. Webb*, 2 B. & P. 98.

(g) And a widow is liable for debts contracted by her before her coverture. *Woodman v. Chapman*, 1 Camp. 189.

are made acquainted with the ideas of others, and communicate their own; as, if a man be born deaf, dumb, and blind¹; it is almost needless to say such persons can make no contract. (*h*)

3. If a man by duress of imprisonment, or by threats, and fear of bodily harm, make a bill of sale, or other disposition of his goods, it would seem that the contract made under such constraint is voidable²; but it will remain valid till avoided by the party injured; for this case is different from that of a person having no capacity to contract, whose act is merely void; but in this case the contract is the voluntary act of the party, done in the exercise of his discretion, which resolves him to submit to the less evil, though the exercise of his free will is restrained.

4. So also the contracts of idiots and lunatics may be avoided³; either during the continuance of their idiocy or lunacy, by the King; or after their restoration to their perfect senses, by themselves.⁴

5. The case of contracts made by infants is somewhat different. It is generally true that an infant cannot make a contract that will bind him; yet, for necessary meat, drink, apparel, physic, and such other

¹ Perk. Grant. 25.

² Roll. Abr. 687. 2. 2 Inst. 482-3. and see Fulbeck's Par. dial. 8. p. 15. and Ff. lib. 4. tit. 6. 1. 3. Bracton, l. 5. 100. b.

³ See Bracton, l. 3. 101. a. *Beverley's case*, 4 Rep. 123.

⁴ B. N. P. 168.

(*h*) It has even been held, that under a plea of the general issue, a person may give in evidence that he was so drunk at the time he made a contract as not to know what he was about; and that such evidence would be sufficient to avoid it, on the ground of the absence of an agreeing mind. *Pitt v. Smith*, 3 Camp. 33.

necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards, he may bind himself.¹ As to the power of an infant to dispose of his property, it is said, that all such gifts, grants, or deeds, made by infants, which *do not take effect by delivery of his hand*, are void; but all gifts, grants, or deeds, made by infants, by matter in deed or in writing, which do not take effect by delivery of his hand, are *voidable*, by himself, by his heirs, and by those who have his estate.² Thus, if an infant deliver a lease, or a sum of money, with his own hands, this is only *voidable*; but if an infant agree to give a horse, and do not deliver the horse with his own hand, and the donee take the horse by the force of the gift, the infant shall have an action of trespass, for the grant was merely void.³ And as an infant is not bound by his contract, if one deliver goods upon a contract, knowing him to be an infant, he is not answerable in trover, or in any other action for them; therefore such delivery is a gift to the infant. But if an infant without any contract wilfully take away the goods of another, trover lies against him; and so, it is said, if he take goods under pretence that he is of age.⁴ Thus it appears that an infant is chargeable for a tort, but a plaintiff cannot convert an action founded on a contract into a tort, for the purpose of charging him. Therefore when, in an action against an infant, the plaintiff declared, that at the defendant's request, he delivered a mare to him, to be moderately ridden, and that the defendant, maliciously intending, &c. wrongfully and

¹ Co. Lit. 172 a. Doc. and Studdal. 2. c. 28. *Pickering v. Gunning*, Palm. 528.

² Perk. 12.

³ *Per Greeng in Daniel v. Uply,*

Latch. 10. 1 Roll. Abr. 730. and *per* Hyde J. in *Manby v. Scott*, 1 Mod. 137.

⁴ *Manby v. Scott*, 1 Sid. 129. *Johnson v. Pic*, 1 Lev. 169.

injuriously rode the said mare, so that she was damaged, &c. it was held that the infancy might be pleaded in bar, the action being grounded on a contract.¹ (i)

It is laid down as a general rule, that infancy is a personal privilege, (k) of which no one can take advantage but the infant himself; and that therefore though the contract of the infant be voidable, yet it shall bind the person of full age; for being an indulgence which the law allows to infants, to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit; and it is not to be extended to persons of years of discretion, who are presumed to act with sufficient caution.² But it seems, that if an infant enter into a contract which is obviously for his benefit at the time it shall bind him.³ (l)

¹ *Jennings v. Rundall*, 8 T.R. 335.

² *Smith v. Bowin*, 1 Mod. 25. *Holt v. Ward Clarencieux*, 2 Str. 939.

³ *Lloyd v. Gregory*, Cro. Car. 502.

Drury v. Drury, 5 Bro. P.C. 570. and *Maddon v. White*, 2 T.R. 161.

(i) But it would appear that an action of assumpsit will lie against an infant to recover money embezzled by him. *Bristow v. Eastman, Peake*, 223.

(k) But as the infant's privilege of avoiding his contracts is merely personal, it does not extend to a person contracting with him, who is always bound whatever may be the legal effect with regard to the infant. *Warwick v. Bruce*, 2 M. & S. 205. and 6 Taunt. 118. Although, where a person who was jointly interested with an infant in a lease, had obtained a renewal to himself alone, it was decided, that if the lease should prove beneficial, the person was a trustee for the infant for his share, though there was no clause of renewal in the original lease, and if it had turned out prejudicial, the lessee must have borne the whole loss. *Ex parte Grace*, 1 B. & P. 376.

(l) Grounded upon the doctrine of law, that the property of goods vests in the consignee upon delivery to the carrier, it was held in a late case, that an infant who had bought goods, which were delivered

It has already been observed, that an infant is bound by his contract for necessities; but such things only as are suitable to the *real circumstances* of the infant are to be deemed necessities; and therefore, where, in *assumpsit for a taylor's bill*, the defendant pleaded infancy; to which the plaintiff replied, that the clothes furnished were necessary for him. The case was shortly this: The defendant, being under age, came to the house of the plaintiff, in company with a man of rank, who was previously his customer, and ordered the clothes, which were to be sent to a coffee-house. It was proved, that at the time of this order, the defendant was provided by his father with all things necessary for his support, and that his father had paid debts to a large amount contracted with other taylor's. It was contended, that as the defendant *appeared* as a man of fortune and figure, whereby the plaintiff was induced to *think* the articles supplied were necessities corresponding with his state and degree, the infant was bound: but Lord Kenyon ruled otherwise; and he said, that nothing was clearer in the law, than that an infant cannot contract a debt except for necessities." — "As to the plaintiff not knowing his fortune, it was no excuse; it was incumbent on him to inquire into that, and to prove it to the jury."

But, though the rank of the infant is to be considered in judging what are necessities, yet, it seems, whatever

¹ *Ford v. Fothergill*, 1 Esp. 211. *Chester*, Cro. Jac. 560. Palm. 361. Peake, 229. S. C. and see *Ive v. S. C.*

to the carrier for her, before she became of age, but which did not reach her until the day of her coming of age, was not liable in an action for the price of the goods. *Griffin v. Langfield*, 3 Camp. 254.

may be the infant's rank in life, for expensive and extravagant dresses; more than absolutely necessary to enable him to appear suitably to his quality, he is not bound: as where, in debt upon a contract for apparel¹, it appeared, that part of the demand was for fustian suits, and part for velvet and satin suits laced with gold, amounting to forty-four pounds. To a plea of infancy, the plaintiff replied, that the defendant was one of the gentlemen of the chamber to the Earl of Essex, and so the apparel was necessary. But the Court held, that such suits of velvet and satin were not necessary for an infant, although he was a gentleman, &c.

So where, in an action for goods sold and delivered², it appeared that the goods in question were a livery for the defendant's servant, he being a captain in the army, and cockades for some of the soldiers belonging to his company. The only question was, if these articles were necessaries: Lord Kenyon C. J. held, that the cockades could not be considered as necessaries; but as to the livery, he could not say that it was not necessary for a gentleman in the defendant's situation to have a servant, and if it were proper for him to have one, it was equally necessary that the servant should have a livery; and his Lordship said, "The general rule is clear, that infants are liable for necessaries according to their degree and station in life. The defendant was placed in a situation which required such attendant. Therefore, however inclined I am in general to protect infants against improvident contracts, I think that this case falls within the fair liability which the law imposes upon infants of being bound for neces-

¹ *Mackarel v. Bachelor*, Cro. Eliz. 583. and see *Stone v. Withpool*, Latch. 213 & P.

² *Hands v. Slany*, 8 T. R. 578.

saries, which is a relative term according to their station in life.”

Regimentals furnished to an infant, who is a member of a volunteer corps, are necessaries. ¹ (m)

So, necessaries for an infant's wife are necessaries for him; but if provided in order to the marriage, he is not chargeable, though she use them. ²

But in no case can an infant who lives with, and is properly maintained by his parent, bind himself, even for necessaries. ³

Neither can an infant be chargeable with goods sold to him to sell again in the way of trade; (n) for it is not necessary that an infant should carry on a trade. ⁴ (o)

But although an infant shall be liable for necessaries, yet if he enter into an obligation with a penalty for the payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the infant ⁵; (p) and it was formerly considered that an

¹ *Coates v. Wilson*, 5 Esp. 152.

² *Turner v. Trisby*, 1 Str. 168.

³ *Bainbridge v. Pickering*, 2 W. Black. 1526.

⁴ *Whittingham v. Hill*, 1 Roll. Abr. 729. Co. Jac. 494. 2 Roll. Rep. 45.

S. C. *Whywall v. Champion*, 2 Str.

1083. *Dilk v. Keighley*, 1 Esp. 480.

⁵ *Cupworth's case*, 1 Roll. Abr. 729.

Co. Litt. 172. a. *Ayliff v. Archdale*, Cro. Eliz. 920. *Delavel v. Clare*, Noy, 85.

(m) But a chronometer is not a necessary for a lieutenant in the navy. *Berrolles v. Ramsey*, Holt, 77.

(n) But an infant will be liable for so much of goods supplied to him to trade with, as were consumed as necessaries in his own family. *Tuberville v. Whitehouse*, 1 Carr. 94.

(o) And by statutes 17 Geo. III. c. 26. § 6. and 53 Geo. III. c. 141. § 8. a contract by an infant for the purchase of an annuity is void.

(p) It has since been decided, that an infant can on no account bind himself in a bond, with a penalty conditioned for the payment of interest as well as principal. *Fisher v. Mowbray*, 8 East, 350.

infant could not make any contract, even for necessities, *in a sum certain*; and that should an infant promise to give an unreasonable price for necessities, such promise did not bind him any more than his bond would; but that the law allowed a reasonable price to those who furnished an infant with necessities¹: but, notwithstanding this, it has been adjudged, that if an infant give *a single bill* for necessities, he shall be bound by it²: from which it would seem that an infant may also be charged upon a promissory note given for necessities, *at the suit of the payee*; but an infant is not liable as acceptor of a bill of exchange, though given for necessities³; or indeed upon any other *negotiable* instrument. (q) Neither is an infant liable upon an account stated, though all the items in the account are necessities; for the law, contemplating the infant's want of discretion, will not subject him to the risk of false accounts.⁴

But though an infant is liable for necessities, yet if he borrow money to buy necessities, he is not liable in

¹ Cases in Law and Eq. 185.

² 1 Roll. Abr. 739. *Ayliff v. Archdale*, *suprà*. *Russel v. Lee*, 1 Lev. 86, 87.

³ *Williams v. Harrison*, 5 Salk. 197.

Carth. 160. S. C. *Williamson v. Watts*, 1 Camp. 562.

⁴ *Wood v. Witherick*, Latch. 169. Noy, 87, S. C. *Trueman v. Hurst*, 1 T.R. 40, and *Bartlett v. Emery*, *ibid.* 42. *note*.

And that, unless he be estopped by some act of full age of as high authority as the bond, he may avoid it. *Baylis v. Dinely*, 3 M. & S. 477. And the Court of Common Pleas declared that a warrant of attorney given by an infant was absolutely void, although the infant appeared to have given it (knowing that it was not valid) in collusion with another person. *Saunderson v. Marr*, 1 H. Black. 75.

(q) Although a bill be drawn, indorsed, or accepted by an infant, it will nevertheless be valid against all other persons who are competent parties to the instrument. *Taylor v. Croker*, 4 Esp. 488.

an action for money lent; although the money was actually expended in the purchase of necessities; for the contract here arises upon the lending, which was a contract that the infant could not enter into; and the subsequent application of the money makes no difference.¹ But under such circumstances, the infant would be liable in equity; the courts of equity holding, that in such cases the lender of the money stands in the place of the person paid, *i. e.* the creditor for necessities; and shall recover in equity, as the other would in law.² (r)

But if an infant borrow money to purchase goods (though not necessities), and after he comes of age expressly promise to pay, such promise shall bind him; though it has been held, that where an infant had bought goods, not necessities, and before the day of payment, died, forbearance to sue the executor of the infant upon this contract was not a good consideration to support an assumpsit, the contract with the infant being merely void³; for if the infant die before he is in a situation to confirm the contract, which, therefore, is void at his death, no forbearance to the executor could be a ground to charge him: but, if the infant live till he come of age, and then promise to pay, this will be binding both on him and his executor; for though the law considers the contract of an infant void, whence it would

¹ *Darby v. Boucher*, 1 Salk. 279.
Earl v. Peale, 1 Salk. 386, 10 Mod.
 67. S. C. *Probart v. Knouth*, 2 Esp.
 497. n.

² *Marlow v. Pitfield*, 1 P. Wms.
 558.

³ *Stone v. Withipool*, Cro. Eliz.
 126. Latch. 21. S. C.

(r) And an infant has been held liable in an action for money advanced to liberate him from an arrest upon mesne process for necessities, or from being taken in execution. *Clarks v. Leslie*, 5 Esp. 23.

seem, that it never could be a good consideration for a subsequent promise, yet as it is to be considered for the benefit of the infant only, and to prevent him from being imposed upon during his minority, if the bargain be considered by him, after he shall have arrived at that age when the law supposes him capable of judging for himself, to be fair and honest, he is bound in honour and conscience to perform it on his part; and it is laid down that a moral obligation is a good consideration for an express promise¹; and therefore, if he choose to waive the privilege which the law conferred upon him to protect him against the impositions of designing persons, the subsequent promise will operate upon the preceding consideration²; but such subsequent promise must be given voluntarily, and with full knowledge by the infant that he then stood discharged by law: and if a promise be extorted by the terror of an arrest, or given from ignorance of the protection which the law affords in such cases, it is not binding.³ But in all cases of subsequent promise, if the original transaction be not perfectly fair, and the infant be entrapped into a ratification of it immediately upon his coming of age, equity will give relief.⁴ (s)

But though no subsequent promise will operate to revive a void security⁵, yet a security given by an in-

¹ Per Lord Mansfield in *Watson v. Turner*, B. N. P. 147. recognised by Lord Ellenborough in *Atkins v. Banwell*, 2 East, 506.

² Per Ashurst J. in *Cockshott v. Bennett*, 2 T.R. 766, and see *Souther-*

ton v. Willook, 2 Str. 690. *Hylling v. Hastings*, 1 Ld. Raym. 389. *Brothwick v. Carruthers*, 1 T.R. 649.

³ *Harmer v. Killing*, 5 Esp. 100.

⁴ *Brook v. Gally*, 2 Atk. 34.

⁵ *Cockshott v. Bennett*, ante.

(s) If a promise be made by one after he comes of age, to pay a debt contracted during his minority when he is able, his ability to

fant, which is only *voidable*, may be revived by a promise after he comes of age¹: but it seems, that if a bond given by an infant, during his minority, for the amount of a simple contract debt, not for necessaries, the giving of the speciality, which is good till avoided by the infant, will extinguish the simple contract debt; and consequently there is no consideration for a promise after full age to act upon; and so, notwithstanding such subsequent promise, an action of assumpsit can be brought on the original consideration²; and if an action is brought on the bond, the infant may avoid it by plea. Yet, in such case, if the obligee forbear to sue upon the bond after the obligor is of age, such forbearance will be a good consideration to support an assumpsit³: but in Roll's Abr. 18. the contrary is laid down for law, and *Morning v. Knop* is cited; but it appears by the report of that case in Cro. Eliz.⁴, that there were only two judges in court when the case was decided, and they differed in opinion on this point. No judgment was given. (t)

¹ *Per Ashurst J. in Cockshott v. Bennett*, ante.

² *Tapper v. Davenport*, 5 Keb. 798.

³ *Stone v. Withipool*, Cro. Eliz. 127, and see 3 Leon. 164. 4 Leon. 5.

⁴ P. 700.

pay must be proved, although it will be sufficient to show his ostensible appearance, and his circumstances as they are open to the inspection of the world. *Cole v. Sasby*, 2 Esp. 159.

(t) It would seem, that a promise made by an infant after he came of full age, to pay a bill of exchange drawn by him during his infancy for necessaries, would be binding upon him if it was an *express* and voluntary promise, *Taylor v. Croker*, 4 Esp. 188: but such a promise as in ordinary cases would be good, as an implied promise, would not be sufficient in this case. *Thrapp v. Fielder*, 2 Esp. 628. And a bill drawn upon an infant, but accepted by him after he came of age, is valid against him. *Stephens v. Jackson*, 4 Camp. 164.

6. It is clear that a person attainted is incapable of making any contract for the purchase or sale of goods; for independent of his being, by the attainder, put out of the protection of the law, and considered to all civil purposes as dead, all his personal property becomes by his conviction forfeited to the Crown; so that he has nothing wherewith to give the *quid pro quo*, which we may remember is necessary in the contract of sale.

It will here be proper to enumerate those offences which induce a forfeiture of goods and chattels, as such forfeiture is a consequence of conviction of many crimes for which the offender is not attainted (which happens only where judgment of death is given).—Goods and chattels, then, are totally forfeited by conviction of *high treason*, or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *manslaughter*; or even by conviction of *excusable homicide*¹; by *outlawry* for treason or felony; by conviction of *petit larceny*; by *flight* in treason and felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *striking any one in the presence of the King's Courts*; by *præmunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by *residing abroad*, of artificers; and by *challenging to fight* on account of money won at gaming.² And this forfeiture accrues upon the conviction of the offender, or, if the jury find that the offender fled, upon the finding of such flight by the jury³; or in case of outlawry for treason or felony, upon the offender being put in the *exigent*, without staying till he is *quinto exactus* or finally outlawed; for the secreting himself so long from justice, is construed a flight

¹ Co. Litt. 391. ² Inst. 516. ³ Inst. 320.

² 2 Black. Com. 421.
³ 2 Inst. 252.

in law.¹ But as this forfeiture of goods has no anterior relation, as in the case of forfeiture of lands, a traitor, felon, or other offender, may sell his goods and chattels at any time before such forfeiture actually accrues to the Crown, by the conviction, &c.²: though it is said, that if the offender be killed in flying from, or resisting the officers of justice, the forfeiture shall relate to the time of the offence committed³; or, according to Lord Hale (and which seems to the better opinion), to the time of flight.⁴ But, notwithstanding an offender may sell his goods *bonâ fide*, before conviction, &c.; yet if he make over such goods by a colourable sale, for the purpose of defeating the right of the Crown, such sale is void, both by common law⁵ and the statute 13 Eliz. c. 5.; and such collusive sale, in fact, transfers no property to the vendee, and the offender, if acquitted, might recover back his goods.

Thus, where one Jones⁶, being in Newgate, made a bill of sale of goods to his son; upon trover brought by the son against the sheriffs of London, the bill was held fraudulent by Lord Holt; though a sale *bonâ fide*, and for a valuable consideration, is good; because the party has a property in the goods till conviction; yet such a conveyance as this cannot be intended for any other purpose than to prevent forfeiture, and defraud the King; and this the learned Judge laid down was a fraud at common law.

7. With respect to alien friends, there can be no doubt about their right to trade in this country; and by consequence, to sue and be sued upon contracts relating

¹ 3 Inst. 222.

² 3 Hawk. P. C. 454.

³ Ibid.

⁴ 1 Hale Hist. P. C. 562.

⁵ 2 Hawk. P. C. 455.

⁶ Jones v. Ashurst, Skin. 357-8.

to personal property, the same as natural born subjects.¹ But with respect to alien enemies, the case is different. It is an established principle of the law of nations, that all trading between subjects of states at war is illegal; a principle obviously arising out of the nature of warfare, which puts each individual of the respective belligerent governments, as well as the governments themselves, in a state of hostility.—“*Nam cum alieni bellum indicitur, simul indicitur ejus populi hominibus,*” says Grotius²; and another jurist says, “*ex naturâ belli commercia inter hostes cessare non est dubitandum.*”³ And there is no such thing as a war for arms, and peace for commerce. (u) In the state of warfare, all treaties, civil contracts, and rights of property, are put an end to: and therefore trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice, and rights of property, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in the most effectual man-

¹ See 27 Ed. 3. c. 2. 14 Ed. 3. st. 2. c. 2. 9 Ed. 3. c. 1. 25 Ed. 3. c. 2. 3 Ric. 2. c. 1., and many other old statutes declaratory of this right, and for the protection of aliens; and see Co. Lit. 129. b. Dyer, 2. b.

² De Jure Belli ac Pacis, 3. c. 4. § 8., and see Vattel, l. 3. c. 5. § 70. and l. 3. c. 15. § 225.

³ Bynkershoeck, Quæst. J. P. lib. 1. c. 3.

(u) No contract made with an alien enemy, can be enforced in a court of British judicature, although the plaintiff do not sue until the return of peace, and although he be an English-born subject resident in the hostile country; therefore, in a case where bills of exchange were drawn by an alien enemy resident in France during war, upon merchants in London, it was held that his having indorsed the bills to a British subject residing in France, did not enable such subject to recover on the bills against the acceptors, after the restoration of peace. *Willison v. Patteson*, 1 Moore, 133.

ner, by enabling the merchants of the enemy's country to support their government. (v)

This principle of the law of nations is most fully recognized by the law of England.¹ The King may, however, by his prerogative, license a British subject to trade with the enemy²; which dispensing power is vested in the sovereign by most of the states of Europe.³ If such licence to trade be obtained, it will so far legalize such trading, as to enable a British subject to maintain an action in our courts upon any contract arising out of it; but it will not remove the disability of the alien enemy to sue, so that though the transaction is legal, by the effect of the licence, a British court of justice cannot enforce it at the suit of an alien enemy residing in the hostile country, *flagrante bello*⁴; and it would seem that no action can be maintained on his behalf; for the right to sue on a contract of sale being

¹ 2 Roll. Abr. 173. The case of *The Hoop*, 1 Rob. Adm. Rep. 196., and *Potts v. Bell*, 8 T.R. 561.

² *Potts v. Bell*, supra, and *Vandyke v. Whitmore*, 1 East, 486.

³ *Bynkershoeck*, Q.J.P. l. 1. c. 3.

⁴ Co. Lit. 129. b. *Dyer*, 2. b. *Timson v. Merac*, 9 East, 35. *Brandon v. Nesbitt*, 6 T.R. 23. *Bristow v. Towers*, 6 T.R. 55.

(v) It seems, that a British subject, living in a hostile state, and carrying on trade under the protection, and for the benefit of that state; *Mac Connell v. Hector*, 8 B. & P. 113.; or residing, and carrying on trade in an enemy's country, though naturalized in a neutral state, *O'Mealey v. Wilson*, 1 Camp. 482., must be considered upon the same footing as an alien enemy.

But if a neutral country be taken possession of by the forces of a state at war with this country, but the civil authorities of the invaded country continue to exercise their functions, though such country commit hostile acts against us, yet if our government do not act with hostility towards them, or show by any public notification that it considers them as standing in a relation of hostility, the subjects of such invaded country are not alien enemies. *Hagedorn v. Bell*, 1 M. & S. 450.

a *cause in action*, the action must at all events be in the name of the assignor; and consequently his personal disability, as an alien enemy, will prevent the recovery by the assignee or trustees. (w)

(w) It may perhaps not be considered foreign to the purpose of this work, to remark here upon the subject of licences granted to trade with an enemy in time of war, that they are to be construed liberally, and not like grants of property from the Crown strictly; and therefore, where an agent in obtaining a licence, did not represent to the privy council, that he applied on behalf of a hostile trader, it was held, that the concealment did not vacate the licence. *Flindt v. Scott*, 5 Taunt. 674. But a wrong description of the person to whom the licence is granted will invalidate it; as, where he was described to be "of London, merchant," whereas he was in fact resident at Heligoland, although he intended to remove and settle in London. *Klingender v. Bond*, 14 East, 484.

A licence to a particular individual to import certain goods, his property, cannot be assigned so as to authorize the importation of goods the property of an assignee. *Feise v. Thompson*, 1 Taunt. 124. Even though a general bill of lading is signed to the individual to whom the licence was granted; the licence being clearly intended only to protect goods which were his property. *Feise v. Waters*, 2 Taunt. 248. But where it appears that no fraud has been committed or meditated, and where the parties have been prevented from carrying the licence into literal execution by a power which they could not controul, they shall be entitled to the benefit of its protection, although its terms may not have been literally and strictly fulfilled. *Gode Hoop Pieters*, quoted 3 Camp. 84.

And where a certain trading is legalized by a licence, every thing necessary to the carrying on such trading is also incidentally legalized. Thus, where a trading for specie and goods, to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the King's authority; it was held, that an insurance on the enemy's ship, as well as on the goods and specie put on board, for the benefit of British subjects, was incidentally legalized; and that it was competent to the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war, the trust not contravening any rule of law or of public policy; and there being no personal disability to sue in the plaintiff on the record. *Kearney*.

But, if an alien enemy come into this kingdom with a safe-conduct, or under the King's protection, his disability to sue is removed, and he is thereby put on the footing of an alien friend¹; and it is not necessary to show an actual licence; for in the report of *Wells v. Williams*, in Lutwyche, it is said, "if an alien enemy come here in time of war, and continue without disturbance, it shall be intended he came with a licence." (x)

There is, however, one peculiar situation in which an alien enemy may be placed, in which his capacity to contract may admit of a doubt, and that is, where he is taken and brought to this country as a prisoner of war: he still continues an alien enemy, and does not come within the exception of residing here under a licence; being merely confined for safe custody, whence it would at first seem that he could form no contract which could be enforced by a court of justice. The solution to this difficulty must be looked for in the nature of the situation of a prisoner of war.

¹ *Watford v. Masham*, Moor, 1 Ld. Raym. 287. 1 Lutw. 54. S. C. 431. *Wells v. Williams*, 1 Salk. 46.

ton v. Inglis, 8 East, 273. And, generally, if the Crown grant a licence to trade to an alien enemy, he may sue in our courts, for any cause of action arising out of such trading. *Usparicha v. Noble*, 13 East, 332.

(x) To prove that an alien resided in this country by the licence, and under the protection of the King, Lord Ellenborough held it necessary, either to produce a protection granted to the alien, or to show in some other way, that his stay after the commencement of hostilities, had been authorized by the King, *Boulton v. Dobree*, 2 Camp. 169., and that it is not enough merely to prove that the alien resided here under a licence, and continued to do so without molestation by our government. *Alciator v. Smith*, 3 Camp. 245.

In former times, prisoners taken in war became the property of the captors, and were sold as slaves, upon the erroneous notion, that having spared the life of the captive in battle, the captor thereby acquired a right to his perpetual service; but this barbarous practice has long been exploded, and in the present age, prisoners of war are only detained till ransomed¹; which is indeed all the legitimate right which conquest confers on the captor over the person of his prisoner; the object of his caption being, only to prevent him from taking up arms again, and thereby weakening the enemy: and as this object can be equally answered by suffering the prisoner to go at large on his parole, as by incarceration, officers; and men whose rank in life entitles them to such confidence in their honour, are usually released on their parole; an indulgence which would ameliorate their captivity but little, if they could not enter into any contract for supplying themselves with the necessaries and conveniences of life; which from the general principles laid down in a former part of this division of the section, it would seem they could not. Writers on the public law do not appear to have noticed this particular case, yet they admit of cases where the individuals of a state may enter into contracts with the enemies of that state²; but these contracts M. Barbeyrac observes³, ought not to be considered valid, unless they are authorised by the express, or tacit consent of the sovereign or state; but in case they are so authorised the sovereign may enforce them. The contract for the ransom of a prisoner, or his property,

¹ Grotius de Jure Belli ac Pacis, lib. 3. c. 7. Bynkershoek Quæst. J.P. lib. 1. c. 1.

² Grotius de Jure Belli ac Pacis,

l. 3. c. 23., De Fide privata in bello; and Puffendorf de Leg. Nat. lib. 8. c. 7. § 16.

³ Note on Puffendorf.

is a contract of this sort, and it never has been doubted, that such contracts are binding by the public law¹; and, except in the case of ships, &c. will be enforced by the law of England²; though in such cases where the party seeking to recover on the contract, is residing in the enemy's country, or *sui juris*, the policy of the law suspends the right of action till the termination of the war, that the hands of the enemy may not be strengthened by drawing money from this country³; but this reason would not apply to the case of a prisoner of war, who cannot go abroad at pleasure. Upon the whole, it would seem, that prisoners of war and officers and others on parole in a particular manner, may make binding contracts during their captivity. In the case of those on parole by the licence of the sovereign, their contracts seem to be within M. Barbeyrac's rule, as made by the *tacit consent* of the state; for it may fairly be presumed, that when any indulgence is granted to a prisoner, those rights which are necessary to the enjoyment of that indulgence are incidentally granted; and as it would be nugatory to allow a prisoner his parole, without allowing him to make a contract for his lodging and other necessities, it surely is not too much to say, that he may bind himself by such contracts made whilst residing here, under what Mr. Justice Heath calls a "protection arising from situation."⁴ That learned judge, in delivering his opinion in the case referred to, observes, "if a prisoner of war is in confinement, he is protected as to his person; if he is on his parole, he requires further protection than what relates merely to

¹ Grotius, l. 3. c. 7. Vattel. L. N. l. 3. c. 8. 155.

² Co. Lit. 129. b.

³ Ricord v. Bettenham, Burr. 1734.

⁴ In *Sparenburgh v. Bannatyne*, 1 B. & P. 171.

¹ W. Black. 563. S. C.

his person." Again, he says, "I will add one case to show that a prisoner at war may sue and be sued. The son of the celebrated Mississippi Law was brought over here as a prisoner at war, and being on his parole, was arrested for ten thousand pounds, by the executor of a creditor, who swore that he was indebted, as appeared by the testator's books; he was discharged, however, not because he was a prisoner at war, but because the executor had not inserted in his affidavit, that he was a debtor 'as he believed.' If a prisoner at war can be sued, there is no reason why he cannot sue." — This opinion is certainly a very respectable authority, but the point has never yet been brought before the Court. The case on which Mr. Justice Heath delivered the opinion above quoted, was decided upon its peculiar circumstances. It was as follows :

Assumpsit for wages due to the plaintiff as a seaman¹: Pleas, 1st, non assumpsit. 2dly, That the plaintiff was an alien, born in foreign parts, to wit, in Holland, in parts beyond the seas, out of the allegiance of the King of Great Britain, and within the allegiance of a foreign power; and that before the suing out of the original writ of the plaintiff, and before the said day and year in the said declaration mentioned, to wit, on, &c. a public and open war was commenced, waged, and carried on, and from thence, &c. between our Lord, the now King of his subjects, and the persons exercising the powers of government in Holland, and the inhabitants and people of Holland under such government, to wit, at, &c. And that the plaintiff, before the said day and year in the said declaration mentioned, and at the suing out of the said original writ of the said plaintiff, and also at the com-

¹ *Sparenburgh v. Bannatyne*, 1 B. & P. 171.

commencement of the said war, was, and ever since has been, and still is, an enemy of our said Lord the King, adhering to the persons so exercising the powers of government in Holland; and being so enemies of our said Lord the King as aforesaid, to wit, at, &c. And this, &c. 3rd Plea. The same as the second; only omitting, "that the plaintiff was an alien, born in foreign parts, to wit, in Holland; in parts beyond the seas, out of the allegiance of the King of Great Britain, and within the allegiance of a foreign power."—Replication: To the first plea, joining issue. To the second, protesting that the said plea, and the matters therein contained, in manner and form, &c. are not sufficient, &c.; nevertheless, for replication in this behalf, the plaintiff saith, That before the making of the said several promises and undertakings of the defendant, in the said declaration mentioned, to wit, on, &c. the said plaintiff was a prisoner at war in the custody of the forces of our Lord the King, in parts beyond the seas, to wit, at the Island of Saint Helena, to wit, at, &c. And being such prisoner as aforesaid, he, the plaintiff, then and there was, by and with the consent and permission of the commanding officer of the forces of our said Lord the King, at the Island of Saint Helena aforesaid, hired, employed, and retained by the defendant, to serve as a seaman and mariner, in and on board the said ship or vessel, called the Caledonia, on his retainer, and at his special instance and request: And he the plaintiff did then and there serve as such seaman or mariner, in and on board such ship or vessel, on a certain voyage, wherein the said ship or vessel was then bound, to wit, from the Island of St. Helena aforesaid to the port of London aforesaid, to wit, at, &c. Without this, that the plaintiff, at the time of

suing forth the original writ of him the plaintiff, was or at any time hitherto hath been, an enemy of our said Lord the King, adhering to the persons exercising the powers of government in Holland, and so being enemies of our said Lord the King, as in and by the said plea is above alleged. And this, &c. A similar replication to the third plea; and issue on the traverses.

It appeared upon the trial, that the plaintiff was a native of Oldenburgh in Germany, and was taken prisoner at the Cape of Good Hope, he then serving as a sailor in the Dutch fleet under Admiral Lucas; that he was sent from the Cape to St. Helena in a British frigate, as a prisoner of war, and was then put on board the *Caledonia*, a British merchantman, then in great want of hands, by order of the governor of the place; that during the voyage from St. Helena to England, he was treated like the rest of the crew, and did his duty to the satisfaction of the captain, the defendant in the action; that on his arrival here, he was delivered over to the commissary with the other prisoners taken on board the Dutch fleet, and was at the time of the action brought in custody as a prisoner of war.—Verdict for the plaintiff, twenty four pounds. Upon a motion for a new trial,

Eyre C. J. stated the question to be, whether on the evidence produced in this case, the plaintiff was to be considered as an alien enemy at the time when the writ issued? “If he must be so considered (said His Lordship), I take it to be a necessary consequence, that this action must fail. The fact is, that this man, being a native of some part of Germany, and, therefore, a neutral by birth, was found on board a ship belonging to the enemies of this country, and was captured in actual hostility. What, then, is his situation? Having

been taken in the act of hostility, he is either a pirate, or, *quoad* that act of hostility, a subject of the prince or power under whose commission he acted. No doubt, this man being a neutral by birth, committed an act of hostility against this country under a commission from a state at war with this country. So far I take it to be clear."—His Lordship, after observing that he agreed with the defendant's counsel, that it was not in all cases necessary to state in a plea of alien enemy, that the party was an alien enemy born, drew a distinction between the subjects of the belligerent state and neutrals, who put on the temporary character of enemies, by accepting a commission from such state; in support of which distinction, he cited the case of *Captain Vaughan*¹, where it was held by Lord Holt, and agreed to by the rest of the Court, that the Hollanders, by accepting a commission from the French king, became *subditi Gallici*, and so remained during the continuance of their service, and in a state of qualified subjection arising out of the service, and determining with it. "Here the commission under which the plaintiff, being a German, acted, was put an end to by the capture of the frigate in which he was. After that he had no opportunity of continuing in the service of the state of Holland; and his temporary character of alien enemy ceased and determined with the authority under which he acted. Captain Vaughan's case, as far as it goes, draws a line, and fairly marks out where that character begins, and where it shall end. I am of opinion, that it determines by the very nature of the subject, and being so determined, the disability of the plaintiff ought not to be enlarged or continued till the war was concluded, to

¹ 4 State Trials, 528.

let in one of the harshest, one of the most impolitic, nay, immoral defences, that ever was set up in a court of justice. The man, whether he was under a safe-conduct or not, did his duty faithfully, and was duly approved of by the officer of the Caledonia: he asks for a moderate reward for his services, and is paid with a plea of alien enemy. This is certainly one of the hardest cases I ever knew, and I think we ought to lean against it. And if a distinction be found between the permanent character of alien enemy, to which the courts of justice cannot give protection, and the temporary character, we shall readily adopt it. As the real justice of the case is with the verdict, and a legal distinction to exclude this unworthy defence can fairly be maintained, I think no new trial should be granted."

Heath J.—"I am quite of the same opinion with my Lord, and glad that some legal ground can be found on which we may repel this dishonest defence. *It has been said, that a prisoner at war cannot contract: his case would be hard indeed if that were true. Officers on their parole must subsist like other men of their own rank: but according to such doctrine they must starve; for they could gain no credit if deprived of the power of suing for their own debts.* It has also been argued, that if the plaintiff was under a protection, that circumstance ought to have been pleaded; and that is true of a formal protection under the great seal; but there may be a protection arising from situation. *I think the plaintiff, being a prisoner of war at the time of making the contract, may maintain an action on that contract, and is protected by law.*

Rook J.—"The defence has no foundation in conscience, in justice, or in public policy, and I do not feel disposed to assist it. An enemy under the King's protection may sue and be sued: that cannot be doubted.

A prisoner at war is, to certain purposes, under the King's protection, and there are many cases where he may maintain an action. I will suppose that an officer of high rank on his parole, is possessed of a ring or a jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him, and to refuse either to advance the money or return the pledge. Surely the Court would say, that he might recover his ring or jewel from the tradesman. The present plaintiff has, in fact, done much the same thing. Under the licence of the King's officer, he pledged his labour at St. Helena in order to procure a more comfortable subsistence. Accordingly he worked his way over, and earned a reasonable compensation. That being the case, I see no reason why he should not recover, *even if he were an alien enemy born.* But as my Lord has not thought proper to go so far, I speak to that point with diffidence, and shall rather avail myself of the distinction which has been drawn between the temporary and permanent character of alien enemy; laying in a claim, however, to say, at any future day, that a person in the situation of the plaintiff is like the officer who pledged his jewel; for this contract was made under the licence of those who had authority to license the contracting party."—Rule discharged.

It will be observed, that this case was decided upon the distinction taken between the temporary and permanent character of alien enemy: a subsequent case, however, arose under similar circumstances, where the plaintiff was a natural-born subject of a state at war with Great Britain.

Assumpsit for work and labour, *quantum meruit*, and the money counts.¹ The defendant pleaded that

¹ *Manis v. Hall*, 1 Taunt. 531. n. 1. 1802. 127
but that he was not bound to pay anything for his services.

the said Joseph, (the plaintiff,) was an alien enemy, born in foreign parts, to wit, in Spain, out of the allegiance of our Lord the King, and within the allegiance of a foreign king, to wit, of the King of Spain, to wit, at London, &c. : and that the said Joseph came into this kingdom without letters of safe-conduct; and that the said Joseph, before and at the time of the commencement of this suit, was a prisoner of war in this kingdom, to wit, at, &c. : And that before and at the time of the commencement of the said suit, the King of Spain and his subjects were at open war with, and the enemies of our Lord the King and his subjects, to wit, at, &c.—The plaintiff replied, as to the said plea, as far as the same relates to the first and second counts of the declaration (protesting that the plea was insufficient): That he the said Joseph, before the time of the doing, performing, &c. the work and labour, &c. to wit, on, &c. in parts beyond the seas, to wit, at, &c. was made prisoner of war by certain forces of his present Majesty King George the Third, and before and at the time of doing, performing, &c., was by and with consent of the commanding officer of the said forces, put under the care and custody of the said George, the defendant, to be by him carried and conveyed, as such prisoner of war, into this kingdom, to wit, at, &c. : And thereupon, whilst the said Joseph was under the care and custody of the said George, and before the doing, performing, &c., to wit, on, &c. at, &c. the said George retained the said Joseph for certain hire and reward to be therefore paid to the said Joseph, to do, perform, and bestow the said work and labour, &c. in the said declaration mentioned: And the said Joseph thereupon, whilst he was so under the care and custody of the said George, to wit, on, &c. and on divers other days between that day, &c. did perform and bestow the said work and

labour, &c. on the retainer of the said George, at his special instance and request, to wit, at, &c.—And as to the said plea, so far as the same relates to the other counts of the declaration: That the said Joseph, before the commencement of this suit, to wit, on, &c. at, &c. came into this kingdom under the protection of his present Majesty King George the Third, and remained and continued in this kingdom under the protection of his said Majesty from thence continually, until the commencement of this suit, to wit, at, &c.—The defendant demurred generally to so much of the replication as related to the first counts, and tendered issue on the residue.—The plaintiff joined in demurrer and issue.

The case was twice argued; and upon the second argument it was said by Mr. Justice Rooke, that the principle laid down in *Sparenburgh v. Bannatyne*, seemed to go the whole length of supporting the present plaintiff's right of action: but the Court took time to consider their judgment. No judgment, however, was ever given.

These cases warrant the conclusion, that, under the circumstances stated in them, an alien enemy may form a valid contract, even during the war; but it may be objected, that though an alien enemy, under certain circumstances, may sue for a remuneration for his *personal labour*, or upon that class of contracts, which the civilians arrange under the head of *do ut facias*; yet, when the contract is *do ut des*, the case is widely different; inasmuch as it is impossible for a prisoner of war to enter into a contract, the object of which is the exchange of money for goods, or goods for money; because all the property possessed by a prisoner of war when taken, becomes the property of the captor, or his sovereign, as being part of the *res hostiles*. To this it

may be answered, that though the principle upon which this objection rests may be true in the abstract, yet the right of spoliation is an odious right, and ought not to be extended to any thing not absolutely seized and reduced into possession. For this we have the authority of Grotius¹: "*Ex eo, quod diximus, captivos nostras servos non esse, sequitur, cessare illam acquisitionem universalem, quam accessionem esse dominii in personam diximus alibi. Non alia ergo captori acquiruntur, quam quæ specialiter apprehenderit: quare si quid clam secum habet captivus, non erit acquisitum, quia nec possessum. Sicut Paulus jurisconsultus contra Brutum et Manilium respondit, qui fundum possessione cepit, thesaurum, quem in fundo, esse nesciat, non cepisse: quia qui nescit nequeat possidere. Cui consequens est, ut res eo modo celata ad redemptionis pretium solvendum prodesse possit, quasi retento dominio.*" To this we may add the authority of Puffendorf² who cites with approbation the following story out of the life of Castriot.³ "A young man of the barbarous nations, who happened to be made a prisoner, was presented to Musachius for his share of the booty, who agreed to give him his liberty for two hundred pieces of gold: the young man immediately took the money out of his pocket, and offered to give it for his ransom; but Musachius refused to accept it, or give him liberty, telling him that the money was his own before, when he became master of his person. But when the case was brought before Castriot, he determined in favour of the young man."

It may be proper here to notice the case of *Anthon v. Fisher*, in which it was determined upon a writ of error

¹ De Jure Belli ac Pacis, lib. 3. c. 27. § 28.

² Lib. 8, c. 7. § 14.

³ Vide Marinus Barletius de Vita Castriotæ, l. 7.

in the Exchequer Chamber¹, that an alien enemy cannot by the municipal law of this country sue for the recovery of a right, claimed to be acquired by him in actual war. Upon a reference to the subject matter of that action (on a ransom bill), it will be seen immediately, that the decision does not at all affect the contracts under consideration; the cause of action arose there not only during the war, *but out of an act of hostility*.

The observations on this subject will be concluded with the opinion of Lord Chief Justice Eyre, upon the argument of policy which is generally urged against giving effect to the contracts of alien enemies. — “As to the ground of policy (says the learned judge)² namely, that a benefit would result to the enemy from the plaintiff recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and jurisdiction of our courts. Such is the case of an outlaw. Modern civilization has introduced great qualifications to soften the rigors of war; and allows a degree of intercourse with enemies, *and particularly with prisoners of war*, which can hardly be carried on without the assistance of our courts of justice. It is not, therefore, good

¹ Dougl. 650. n.

² In *Sparenburg v. Bannatyne*,
1 B. & P. 170.

policy to encourage these strict notions, which are insisted on contrary to morality and public convenience."

SECT. II.

Of Contracts made by one of several Partners.

As we shall have occasion in this section, to see to what an extensive liability persons trading in partnership may be subjected by the act of one of the partners; it will be necessary, in the first place, to ascertain what shall be considered as constituting a partnership.

It seems essential to the very nature of a partnership, that there should be a communion of profit and loss. The shares of the several partners may be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. And therefore, where A. B. and C. ordered D., a broker, to buy a quantity of oil. B. and C. were to have for their respective shares, each one fourth. The broker buys divers ship loads: the purchase was made in the name of A. It was held by Lord Loughborough C. J., Heath J., and Gould J., against the opinion of Wilson J., that B. and C. were not partners with A., there being no communion of profit and loss.¹ So, where the plaintiffs, who were

¹ *Coupe v. Eyre*, 1 H. Black, 37. and see *Dry v. Boswell*, 1 Camp. 329.

bankers', had advanced a sum of money on certain tea warrants of the East India Company, to Contencin, a broker, who deposited the warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. It appeared he had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the East India Company's sale, of which they (together with himself) were to have separate shares, the lots being in general too large for one dealer. The practice at such sales is, for the Company to give a warrant to the broker or purchaser for the delivery of the quantity of tea purchased, on payment being made. At the time of sale twenty-five per cent. is advanced, and is forfeited unless the whole is paid on the third, which is the last day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened, however, in this instance, that between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the India House, that the value of tea sunk so much as to be considerably under the amount of the sum advanced. The broker in the mean time had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead or become bankrupts. The shares of the defendants were to be two sixteenths of the whole lot. The action was brought for money lent, and the ground upon which the defendants were sought to be charged was, that all the employers of the broker were to be

considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two sixteenths, nor was there any joint concern in the disposal of the tea. Under these circumstances the Court held, that there was no partnership between the several purchasers, but merely an undertaking by each with the broker for a particular quantity; and Lord Mansfield said, it would be dangerous if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. And Buller J. added, the plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners among themselves; they had never met or contracted together as partners. If this transaction was sufficient to constitute a partnership, a broker would have it in his power to make five hundred persons partners who had never seen or heard of each other; or might at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants.

But to constitute a partnership, there must be a participation in *uncertain* profits and losses: for if a party derive a *certain* profit out of a trade (though, if amounting to more than *five pounds per cent.* upon his capital embarked in it, it may be usury) he is not liable as a partner (y); and the true criterion to determine (where money is advanced to a trader) whether the

(y) An agent who is paid by a proportion of the profits of an adventure, does not thereby become a partner in the goods. *Meyer v. Sharpe*, 5 Taunt. 75.

lender is to be looked upon as a partner or not, is to consider whether the premium or profit is *certain and defined, or casual, indefinite and depending upon the accidents of trade*. In the former case it is a *loan*, in the latter a *partnership*. And, therefore, where a retiring partner left four thousand pounds in the hands of the continuing trader for seven years, at five pounds per cent. interest, and an annuity of three hundred pounds for the seven years, for the payment of which he took a bond; it was held, that this transaction was neither a continuation of the old partnership, nor a commencement of a new one.¹ But it is otherwise when the annuity is avowedly to be paid in lieu of the profits of the trade, and liberty is reserved for the annuitant to inspect the books.²

If persons appear to the world to be carrying on business in co-partnership, the presumption of law is, that they are partners *inter se*; but even if that be not so, they are liable, as partners, to third persons. As where A.³, having neither money nor credit, offers to B., that if he will order with him, certain goods to be shipped upon an adventure, *if any profit should arise from them, B. should have half for his trouble*. B. having lent him his credit on this contract, and ordered the goods *on their joint account*, which were furnished accordingly, and afterwards paid for by B. alone, it was held, that though he was entitled to recover back such payment against A., who had not accounted to him for the profits, such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; yet B. was liable as a partner

¹ *Grace v. Smith*, 2 W. Black. 998.

³ *Hesketh v. Blanchard*, 4 East,

² *Blaxham v. Fell*, cited in 2 W. Black. 999. 144.

to third persons. So, where A. and B., ship-agents at different ports¹, entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing ships consigned to them, &c. By this agreement they were to become liable as partners to all persons, with whom either contracted as such agent. And again, where A. B. and C.² the proprietors of a stage-coach, agreed to divide the general profits of the concern, and that they should each work the coach a stage with horses, their separate property, and maintained respectively at their separate expence; it was holden, that B. and C. were jointly liable as co-partners with A., for the price of hay furnished at A.'s request, for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him, under the agreement. (x)

But in such cases a party *who has notice* of the agreement between the parties, shall not avail himself of the

¹ *Waugh v. Carver*, 2 H. Black. 235.

² *Barton v. Hanson*, 2 Camp. 97.

(x) The Court afterwards granted a new trial in this case, on the ground that the defendants were *not* jointly liable as co-partners, for the price of the hay and goods furnished by the plaintiff; it appearing, that what had been called a division of profits, was merely a division of the gross proceeds, in proportion to the number of miles worked by each proprietor. *Barton v. Hanson*, 2 Taunt. 49. But although such proprietors are not partners, as regards the tradesmen who furnish goods for the use of the concern, yet they *are* as between themselves. This was settled in a recent case, where it was held, that in an action by one party against another, upon a separate transaction, the defendant could not set off a balance which had been declared in his favour upon a weekly settlement of the accounts between the parties. *Fromont v. Coupland*, 2 Bing. 170.

circumstance of the ostensible partnership; as where there was a stipulation between A. B. and C., who appeared to the world as co-partners¹, that C. should not participate in the profit and loss, and should not be liable as a partner, C. was held not liable to those who had notice of this stipulation; and that notice to one member of a firm was notice to a whole partnership.

But it is not every joint speculation in one or more adventures that will constitute a general partnership²; though if it appear that two persons have in many instances traded jointly, that will be *prima facie* evidence of a general partnership; particularly if the instances of *jointly dealing* greatly outweigh the instances of *separate dealing*. Thus, where A. and B.³ had dealt as partners in two transactions only; it was urged that this would raise such a strong presumption of a general partnership, as to dispense with proof that the particular debt sought to be recovered was contracted on the joint account: but Lord Ellenborough observed, that had the instances of joint dealing preponderated, he thought the *onus* would have been upon the defendants to have shown that there was not a general partnership. (a)

¹ *Alderson v. Pope*, 1 Camp. 404. n.

² *De Berkow v. Smith*, 1 Esp. 39.

³ *Newham v. Tetherington*, cor-
am Lord Ellenborough at Guildhall,
Sittings after H. T. 7th of March 1810.

(a) But if several persons agree to share in goods to be purchased, and, in consequence of that agreement, one of them goes into the market and makes the purchase; although he is not expressly authorised to purchase for the others, yet it is the same thing as if all the names had been announced to the seller, and all the parties are answerable for the value of the goods. *Gouthwaite v. Duckworth*, 12 East, 421.

Acts subsequent to the time of delivering goods, may be admitted as evidence, to show that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act, by any person who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them, as partners, for the very goods) will make him liable in an action for goods sold and delivered.¹

But on the other hand, as a man is thus protected against debts due by the partnership, before he entered into it, so he will continue liable for the debts of the firm, after he may in fact have withdrawn, unless the creditors of the concern have notice of the dissolution: and it seems that notice in the London Gazette, will not be sufficient notice to those who have had no previous dealings with the parties²: but it is incumbent on persons dissolving a partnership, to send notice of such dissolution to all the persons with whom they have had any dealings.³ (b) And therefore, where a partner retires from a firm without giving notice, and the name of the firm continues without any alteration, any person

¹ *Saville v. Robertson*, 4 T.R. 720.

² *Godfrey v. Turnbull*, 1 Esp. 371.

and the same case by the name of *Godfrey v. Macaulay*, Peake, 155. n.

³ *Graham v. Hope*, Peake, 154.

(b) An act of bankruptcy committed by one partner dissolves the firm, and deprives that partner of the power of disposing of the partnership goods. *Hague v. Rolleston*, 4 Burr. 2174. But although one partner may have committed a secret act of bankruptcy, a *bona fide* sale for a valuable consideration by the solvent partner will be valid, and the purchaser will be entitled to retain the goods against the assignees of the bankrupt. *For v. Hanbury*, Cowp. 445.

dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm.¹ But it is otherwise in the case of a partner whose name does not appear in the firm; he is liable only for goods furnished during the time he receives a share of the profits, though no notice be given on his retirement; unless he be known to be a partner, in which case he is liable the same as if his name had appeared in the firm.² (c)

Every parol contract by one partner in the name or on the account of the firm, binds the rest, as in the case of agreements under hand, parol agreements, strictly so called (as contradistinguished from written agreements), bills of exchange, &c.³; but one partner cannot bind his co-partners by deed. (d) And therefore

¹ *Parkin v. Carruthers*, 3 Esp. 248.

³ *Parkin v. Harcourt*, 5 Esp. 249.

² *Evans v. Drummond*, 4 Esp. 89.

(c) But where, after notice of dissolution published in the *Gazette*, and sent round to the proper parties, one of the partners carries on business under the old firm; the retiring partners are not liable to a party who was ignorant of the dissolution of partnership, unless it appear that they have interfered in the business, or authorised the use of their names. *Newsome v. Coles*, 2 Camp. 617.

And where two of three partners, who had contracted a debt prior to the admission of the third partner into the firm, had accepted a bill drawn by the creditor in their joint names; it was held, that such acceptance did not bind the third partner without his assent, but that such security was fraudulent and void as against him, and could not be recovered in an action against the three, wherein one only of the original partners had pleaded. *Shirreff v. Wilkes*, 1 East, 48.

(d) Nor can one partner bind the partnership, by guaranteeing the debt of a third person, without a special authority for that purpose from his partners. *Duncan v. Lowndes*, 3 Camp. 478. Nor upon a dissolution of partnership, can that partner who is entrusted with the

when, in an action of covenant¹ upon an agreement of three parts, stated in the declaration to have been made between Jackson, Sykes, and Rushforth, describing them as merchants and partners, of the first part, W. and J. Harrison of the second part, and the plaintiff of the third part; it appeared that the deed was executed by the defendant Sykes in the following form: — “For Jackson, Self, and Rushworth: W. Sykes.” But neither Jackson nor Rushworth was present at the execution. The Court held, that a general partnership agreement, though under seal, did not authorise the parties to execute deeds for each other, unless a particular power be given for that purpose. And that the contrary would be a most alarming doctrine to hold out to the mercantile world; for if one partner could bind the others by deed, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a lien on the real estates of the other partners.(e) But in mercantile transactions, in drawing and accepting bills, it never was doubted but that one partner might bind the rest, even without their knowledge or consent.(f) Thus, where one of two

¹ *Harrison v. Jackson*, 7 T. R. 207.

settlement of affairs, indorse in the name of the firm a security which formed part of the joint effects. *Abel v. Sutton*, 3 Esp. 108.

(e) But where a deed was executed by one partner for both, in the presence of and by the authority of the other, it was held a good execution by both, though only sealed once. *Ball v. Dunsterville*, 4 T. R. 313.

(f) And where one of several partners, made a contract as to the terms on which any business was to be transacted by the firm (although such business was not in their usual course of dealing, and even contrary to their arrangement with each other), and the busi-

partners¹, though with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use; if there was no collusion between him and the seller this is to be considered as a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties. But where one partner colludes with a third person; or the person dealing with such partner knows that he is not acting on behalf of the firm, the partners will stand discharged of any contract under such circumstances, as against the person so colluding. (g)

Assumpsit by the plaintiff² as indorsee of a bill of exchange, drawn by R. Cowan on one Rae, at two months after date, in favour of R. Packer, for sixty pounds, dated the 4th of March 1796. The case as proved on the part of the plaintiff, was, that on the

¹ *Bond v. Gibson*, 1 Camp. 185.

² *Arden v. Sharpe*, 2 Esp. 523.

ness was afterwards transacted by and with the knowledge of the other partners, it was held that they were bound by the contract made by their partner. *Sandilands v. Marsh*, 2 B. & A. 673. And where A. B. and C. were engaged in the cotton trade, under the firm of A. and B. (C. not being known to the world as a partner), and A. and B. traded under the same firm as grocers; and a bill given to them in the cotton business was indorsed in the name of the firm common to both partnerships, and given in payment by A. and B. for goods received in their grocery business; it was held, that C. was liable to pay the bill to the holders, although the indorsement was unknown to C., of whom the indorsee had no knowledge at the time of the indorsement. *Swan v. Heald*, 7 East, 209.

(g) Money borrowed on the partnership account by one partner, for the purpose of defraying his expenses whilst transacting the business of the house, is a charge upon the whole firm. *Rothwell v. Humphreys*, 1 Esp. 406.

1st of March, the day on which the bill bore date, Gilson, one of the defendants, brought the bill in question to the plaintiff, and requested him to discount it: the plaintiff said he could not do it himself; upon which the defendant Gilson, answered, he could get it done for him, but wished the business to be kept a secret from his partner, Mr. Sharpe, to which the plaintiff assented and took his bill. It was found, that the indorsement "Sharpe and Gilson," was the handwriting of Gilson. — Lord Kenyon: "This action, under the present proof, cannot be supported. The bill is indorsed by one partner in the name of the firm; one partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hands of a *bona fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable: but the case is different where the party who brings the action was himself the person who took the bill with the indorsement of one partner only, and was informed that the transaction was to be concealed from the other: he cannot sue the partnership; the transaction indicates that the money was for the partner's own use, and not raised on the partnership account; therefore he shall not be allowed to resort to the security of the partnership, to which in the original transaction he neither looked nor trusted." (h)

(h) In another case in *bank*, the principle was recognised, that if a partner draw or indorse a bill in the partnership name, it will *prima facie* bind the firm, although passed by the one partner to his separate use; unless there be evidence of covin between such se-

The authority of one partner to pledge the credit of the firm is not essential to a partnership : but such an authority is *implied* in every partnership, unless that implication is rebutted ; as in the following case. — The plaintiff declared upon a promissory note made by the defendants, and one Whitehouse, deceased¹, on the 16th day of December 1805, payable sixty days after date, to the plaintiff, or order, for two hundred pounds, value received. It appeared, that the defendants and Whitehouse were partners in a brewery, and on the 16th day of December 1805, Matthew wrote to the plaintiff, alleging the misconduct of his partner Smithson, in consequence of which the creditors of the partnership had insisted on the payment of their demands ; that there was a certain sum to pay to the excise in a few days, and no resource but to apply to friends ; and therefore requested of the plaintiff to lend him his acceptance for two hundred pounds at two months, for which he would send him the promissory note of the firm, payable four days before the acceptance became due. In consequence of this, the plaintiff agreed to lend his acceptance, and Matthew drew the note in question, which was signed for himself and his partners. Matthew immediately procured the plaintiff's acceptance to be discounted, and applied one hundred and eighty pounds of the money to the payment of the partnership debts, reserving the rest for himself. But the note in question not being paid when demanded of the defendants, the plaintiff, after renewing his acceptance to the holder, was ultimately obliged to pay it

¹ *Lord Galway v. Matthew*, 10 East, 264. 1 Camp. 405. S.C.

parate partner, and the person receiving the bill ; or at least, a knowledge that the bill was so applied to the separate use of one partner. *Ridley v. Taylor*, 13 East, 175.

after Whitehouse's death. Matthew let judgment go by default, and Smithson defended the action, on the ground that the plaintiff, before he took the note in question, had notice of an advertisement then recently published in a newspaper by Smithson, wherein he warned all persons not to give credit to the defendant Matthew on his (Smithson's) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. Upon this being proved the plaintiff was nonsuited, and the Court afterwards refused a rule to set aside this nonsuit, and Lord Ellenborough said, "The general authority of one partner to draw bills or promissory notes to charge another is only an *implied* authority; and that implication is rebutted in this instance by the notice given by Smithston, who is now sought to be charged, *which reached the plaintiff*, warning him that Matthew had no such authority. It is not essential to a partnership, that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others." (i)

(i) A pledge by one partner of the partnership property, will bind his co-partners, although the pledge is made without their privity or consent, provided that the pledgee had no notice that the property was joint property, and there be no fraud in the transaction. *Raba v. Ryland*, 1 Gow. 135.

SECT. III.

Of Contracts made by Agents.

UNDER the general head of agents, may be included all factors, brokers, supercargoes, &c. A factor is a merchant's agent, either residing abroad, or in a different part of the kingdom from the merchant, to whom goods are consigned to be sold on commission, on account of his principal, and was formerly constituted by letter of attorney, but at present this formal appointment is frequently omitted; indeed, such an appointment is not at all necessary to enable the factor to dispose of the goods, for the mere possession will, as between him and third persons, raise an implication of a right to sell. When factors reside in England, and are employed by persons at a distant part of the country, they are called *home* factors, as distinguished from *foreign* factors; such are the Blackwell-hall-factors, corn-factors, &c.

Brokers also are persons who buy and sell for others upon commission, and are generally confined to particular trades; thus we have sugar-brokers, bill-brokers, stock-brokers, &c. Supercargoes are in the nature of factors, and are put on board of ships by a merchant to dispose of the cargo to the best advantage abroad. (*k*)

(*k*) The character of broker is materially different from that of factor, the latter having the goods consigned to him, and usually selling them in his own name, without disclosing that of his principal; but the former is not entrusted with the goods, and ought not to sell in his own name: therefore, where a broker does sell in his own name, and without disclosing that of his principal, he acts beyond the scope

It is very common to intrust factors and other agents to dispose of goods as their own, and to the best advantage; in which case the principal is bound, though the factor make an improvident bargain: but it seems that a bare commission to sell will not authorise the factor to sell on credit, other than the *usual credit* of the trade; and a factor ought to sell for the best advantage of his principal, and render a faithful account; and either remit the money to his employer, or return the commodity, if unsold, on demand¹: but no action lies against him for not accounting, till after a demand made of an account.² (l)

As to sales by factors on credit, Willes C. J., in *Scott v. Surman*³, says,—It has been objected that a factor, by virtue of a general authority, cannot sell on credit, and that if he do so it is at his own risk, and the owner is not obliged to accept the vendee as his debtor. And for this purpose several passages were cited out of the civil law books of the nature of a factor. To this I shall give two answers: 1st. that the nature of dealing is now quite altered, of which Courts of law must take notice; for constant and daily practice shows that

¹ *Sadock v. Burton*, 1 Bulst. 103.
Yelv. 202. S. C.

² *Topham v. Braddick*, 1 Taunt. 572.
³ Willes, 406.

of his authority, and the buyer cannot set off a debt due from the broker to him, against the demand for the goods made by the principal. *Baring v. Corrie*, 2 B. & A. 137.

(l) And if a factor grossly misconduct himself, he is not entitled to any commission. *White v. Chapman*, 1 Stark. 113. Or if, being a sworn broker, he execute his duties in such a manner that no benefit results from them, he is not entitled to recover either his commission or a compensation for his trouble. *Hamond v. Holiday*, 1 Carr. 384.

factors do sell upon credit, without such special authority. If it were otherwise, it would be the greatest prejudice to trade, as it would be likewise, if this notion should prevail, that the owner must suffer by the factor's becoming a bankrupt: and we ought always as much as we can, and as far as is consistent with the rules of the law, to do every thing to promote the trade and commerce of the nation. And *Chambre J.*, in *Houghton v. Matthews*¹, says, there is no doubt of the authority of a factor to sell upon credit, though not particularly authorised by the terms of his commission so to do. But as this authority is referred to universal usage, no such authority will be implied, unless it appear that it was the usual manner of dealing with reference to the thing sold. And therefore, when, in an action for not transferring stock², it appeared that the defendant had employed a broker to sell out stock, which the broker accordingly agreed to sell to the plaintiff; but as the transfer could not be made till the expiration of a fortnight, the plaintiff paid for the stock by a promissory note at fourteen days, which the broker thought it to be to the advantage of his employer to take, thinking the stock might fall before the transfer could be made. The note was paid by the broker into his own bankers, where it was attached for a debt of his own; and at the end of a fortnight the defendant refused to make the transfer, as he had received no part of the purchase money. Lord Ellenborough C. J. said, when the defendant employed the broker to sell the stock, he employed him to sell it *in the usual manner*; he made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock

¹ 5 B. & P. 489.

² *Wiltshire v. Sims*, 1 Camp. 256.

being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of stock which he agrees to sell? The broker here sold the stock in *an unusual manner*; and unless he was expressly authorised so to do, his principal is not bound by his acts.

The employment of a factor, broker, &c., being merely to sell, he has no power to pledge the goods¹ (m);

¹ *Martin v. Coles*, 1 M. & S. 140.

(m) A factor has no power to pledge the goods of his principal, even where he accepts bills on account of the consignors, and is directed by them to deal with the goods according to his discretion. *Graham v. Dyster*, 2 Stark. 21. And where a factor, having received from his principal, who was a foreigner, oats to sell, deposited them with the defendant, in the first instance clearly as a pledge for advances, and afterwards, becoming embarrassed, directed a broker to sell, who agreed with the defendant that he should become the purchaser at the then market price, but no account of sale was ever rendered, or money paid; it was held, that this was not such a mercantile sale, as altered the nature of the original transaction, which was an unauthorised pledge, and that the defendant was liable to the principal. *Kuckein v. Wilson*, 4 B. & A. 443. Nor does the circumstance of the merchant drawing bills upon the factor to whom the goods are consigned, against the consignment, give an authority to the factor to raise money to meet the bills by pledging the goods. *Fielding v. Kymer*, 2 B. & B. 639. *Gill v. Kymer*, 5 Moore, 518.

And where an agent had pawned the goods of his principal, it was held, that after demand, trover would lie against the pawnbroker without tendering to him the duplicate according to the statute, 39 & 40 Geo. III. c. 99. § 7., or the amount for which the goods were pledged, and interest thereon. *Peet v. Baxter*, 1 Stark. 472.

Nor has a factor who is employed to sell, an authority to barter for other goods, and if he do barter the goods of his principal, and deliver them, and receive other goods in exchange, no property passes by the delivery, and the owner may maintain trover against the person to whom they were bartered and delivered, even although he did not know that he had been dealing with a mere factor. *Guerreiro v. Peile*, 3 B. & A. 616.

and therefore, if a factor pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee¹; and that, even, though the factor or broker may have a lien on the goods, for his balance due at the time of the pledge: but it may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession as his servant for the preservation of his lien.² So, as a factor cannot pledge the goods of his principal by delivery of the goods themselves, neither can he do so by indorsement and delivery of the bill of lading: and this rule holds equally good where the pawnee did not know that the pawner was a factor, for he might have inquired for the letter of advice which contained the bill of lading, which would show that the goods were held as a factor, and not as vendee: but if persons will neglect all precaution, and advance money on goods without inquiring whether the party had any right to dispose of them or not, they must bear the loss, if it turn out that he had no authority so to do.³ (n)

¹ *Dalbigny v. Dimal*, 5 T. R. 604.
Mac Combie v. Davies, 6 East, 538.

² *Mac Combie v. Davies*, 7 East, 51.
³ *Newson v. Thornton*, 6 East, 17.

But it seems that this rule does not apply to the case of a banker (or indeed any other person), pledging indorsed bills of exchange, deposited in his hands by a customer. Per Eyre C. J. *Collins v. Martin*, 1 B. & P. 651.

(n). But by stat. 4 Geo. IV. c. 83., persons in whose names goods shall be shipped, shall be deemed to be the true owners thereof, so as to entitle the consignees to a lien thereon in respect of their advances, or of money or other negotiable securities received by the shippers

It is generally true that a factor's sale does by

to the use of the consignees; provided that the consignees have no notice that the consignors are not the actual proprietors of such property. And any person may take goods or bills of lading in pledge from any consignee, but such person shall not acquire any further or greater right to the goods than the consignee possessed; so that the true owner is not precluded from a power to redeem, or to recover the balance of the produce. And in case of the bankruptcy of the consignee, the owner shall be considered to be discharged *pro tanto* from the debt due to the bankrupt.

This statute is very considerably altered and amended, although not positively repealed, by a very recent act, 6 Geo. IV. c. 94.; by which it is enacted, in section 1. that persons who shall be intrusted with goods or merchandize for the purpose of consignment or sale, and who shall have shipped such goods in their own names, and any persons in whose names goods shall be shipped by any other persons, shall be deemed the true owners thereof, so far as to entitle the consignees of such goods to a lien thereon, either in respect of advances made by such consignees to the use of the persons in whose names the goods shall be shipped, or in respect of monies received by them to the use of the consignees; provided that the consignees have no notice by the bills of lading or otherwise, at the time of the advances or receipts in respect of which the lien is claimed, that the persons shipping the goods, or in whose name they are shipped, are not the actual owners. And the persons in whose name goods are shipped, are to be taken to have been intrusted therewith for the purpose of consignment or sale, unless the contrary appear to be the case.

Section 2. enacts, that after the 1st. October 1826, all persons intrusted with the possession of bills of lading, India warrants, dock-warrants, warehouse-keepers' certificates, wharfingers' certificates, and warrants or orders for the delivery of goods, shall be deemed to be the true owners of the goods, so far as to give validity to contracts for the sale or disposition of such goods, or for the deposit or pledge thereof, upon the faith of such several documents; provided that the parties have no notice that the persons so intrusted are not the true owners. But section 3. provides, that if any person after the passing of the act, shall with such notice accept such goods in pledge from any such person intrusted as aforesaid, as a security for an antecedent debt due from such intrusted person, he shall have no further or other right or interest in the goods or document than was possessed or might have been enforced by the person so intrusted at

law create a contract between the owner and the buyer; and that though the factor receive a *del*

Scrimshire v. Alderton, 2 Str. 1183.

the time of such deposit or pledge; although he may acquire and enforce a right to the full extent of that possessed by the party so intrusted as aforesaid.

Section 4. enacts, that after 1st October 1826, parties may contract with agents who are intrusted with goods, or to whom the same are consigned, for the purchase of such goods, and may pay the agents, and the contract will be binding upon the owners, notwithstanding the parties had notice that they were only dealing with agents, if the contract or payment be made either in the ordinary course of business, or even out of that, if it be within the agent's authority.

Section 5. enacts, that from the time of passing the act, persons may accept in pledge, goods, or such documents as aforesaid, from factors or agents, notwithstanding they have had notice that the parties so pledging are merely factors or agents; but the parties in that case, shall acquire no further interest than what was possessed by the factors or agents at the time of the pledge, although they shall acquire an interest to that extent.

By section 7., factors or agents who shall pledge goods or documents after the 1st October 1826, and shall apply the proceeds to their own use, in violation of good faith, and with intent to defraud the owners, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to transportation for a term not exceeding fourteen years, or to the other legal punishments for misdemeanors. But this is not to extend to cases in which the agent has not made the goods a security for any sum beyond the extent of his own lien; provided that the acceptance of bills by an agent, shall not create a lien so as to excuse the pledge, unless the bills are paid when due. Nor does it extend to partners who are not privy to the offence.

Nor by section 6. is the act intended to deprive an owner of his right to follow his goods, whilst in the hands of his agent, or of his assignee, in case of bankruptcy, or to recover them from a third person upon paying his advances secured upon them: and in case of the bankruptcy of the factor, the owner of goods so pledged and redeemed, shall be deemed to have discharged, *pro tanto*, the debt due from him to the bankrupt.

credere (o) commission.¹; and, therefore, if a factor sell goods in his own name, without any reference to the principal, or without even making the principal creditor for them, in which case payment to the factor would discharge the vendee, yet if, before actual payment, he receive notice from the principal not to pay the factor, notwithstanding which he does pay him, the principal may maintain an action against him for the price of the goods; unless

¹ *Escot v. Milward*, Co. B. L. 414. and 7 T. R. 361. n. *Ex parte Murray*, Co. B. L. 415.

(o) *Del credere* is an Italian mercantile phrase, which has the same meaning as the Scotch word *warrantie*, or the English word *guarantee*. A factor who has general orders to dispose of goods for his principal to the best advantage, is bound to exercise that degree of diligence which a prudent man exercises in his own affairs, and consequently the factor is authorised to dispose of the goods on the best terms which can be obtained at the time; and if it shall appear that he has done so, and that he has sold the goods to persons in reputed good circumstances, at the time, and to whom at that time he would have given credit in his own affairs, he will not be liable to his principal, although some of these persons should fail; and for his trouble, the factor is generally paid by a commission of so much per cent. upon the goods sold. According to this practice, the principal runs all the risk, and the factor is sure of his commission whether the event be favourable or not. But many merchants do not choose to run this risk, and to trust so implicitly to the prudence and discretion of their factor; and, therefore, the agreement called *del credere* was invented, by which the factor, for an additional premium, beyond the usual commission, when he sells the goods on credit, becomes bound to warrant the solvency of the purchasers. *M'Kenzie v. Scott*, 6 Bro. P. C. 287.

And in the case of an insurance effected by a broker, a *del credere* commission is an absolute engagement to the principal by the insurance broker, and makes him liable in the first instance, and at all events, although the principal may resort to the underwriter as a collateral security. *Grove v. Dubois*, 1 T. R. 112.

the factor had a lien on them.¹ (p) But, generally speaking, when the owner of the goods allows the broker through whom he sells, to sell them as a principal, the purchaser of goods so sold, is discharged by payment to the broker in any way which would have been sufficient had he been the real owner²; and therefore, if a broker sell goods as his own, the purchaser (not knowing of any principal) has a right to consider him as a principal; and consequently set off any debt due from him against the price of the goods³: yet if, in such case, before all the goods are delivered, and before any part of them is paid for, the purchaser is informed that they belong to a third person, he cannot set off a debt due from the factor in an action by the principal.⁴ So, if goods are bought by a broker, who does not mention his principal until he himself has become insolvent, the buyer cannot set off the price of the goods against a debt due to him from the broker, but still is liable to the vendor.⁵ (q) So, too, if goods are sold to a broker

¹ *Drinkwater v. Goodwin*, Cowp. 254. *George v. Clagett*, 7 T.R. 359. 1 Esp. 557. S. C.

² *Coates v. Lewes*, 1 Camp. 444.

⁴ *Moore v. Clementson*, 2 Camp. 22.

³ *Rabone v. Williams*, 7 T.R. 360.

⁵ *Waring v. Faenc*, 1 Camp. 85.

(p) It has been even held at Nisi Prius, that a factor may sue in his own name for goods sold, although the name of the owner be declared at the time of sale, *Atkyns v. Amber*. 2 Esp. 493.

(q) A broker who does not disclose his principal, may vary the terms of payment after the sale is completed, but when the principal is disclosed, the broker is no longer authorised to alter the terms of the contract. *Blackburn v. Scholes*, 2 Camp. 343.

And where the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in fact the agent of another, elects to give the credit to such agent, he cannot afterwards recover the value against the known principal; but if the principal be not known at the time of the purchase made by the

at a specified credit, the principal is liable to the vendor, if called upon when payment becomes due; although he may previously have paid the price of the goods to the broker, who became insolvent before the day of payment. But if, in such cases, the day of payment be suffered to pass, without any demand being made on the principal, it seems that he is discharged by payment to the broker; for as no demand is made upon him by the vendor, he may fairly conclude that he relies on the broker for payment.¹

If goods are sold by a broker for a principal not named, upon terms, as expressed in the *bought* and *sold* notes delivered over to the respective parties by the broker, of "*payment in one month, money*," the buyer is discharged by a payment to the broker within the month; and that, though the payment be made by a

¹ *Kymer v. Sowercropp*, 1 Camp. 109. & 180. c.

agent, it seems, that when discovered, either the principal or the agent may be sued at the election of the seller; unless, where by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad. *Patterson v. Gandasequi*, 15 East, 62.

And where a party bought goods, in the name and upon the credit of another person, but in reality upon his own account, he was held to be liable. *Railton v. Hodgson*, 15 East, 67. n. But where A., a foreign merchant, employed B. to purchase goods on commission, and the vendors with the knowledge that the purchases were made on account of A., made out the invoices to B., and took in payment his acceptance at six months; it was held, that there was no contract of sale as between A. and B. *Seymour v. Pychlau*, 1B. & A. 14. And where a bankrupt carried on business for the benefit of his creditors, as their agent, under the authority of the assignees, and ordered goods in his own name, which were used in the business, it was held that, he was merely an agent, and that the assignees were liable. *Kinder v. Howarth*, 2 Stark. 354.

bill of exchange, accepted by the buyer, and discounted by him within the month: the stipulation in the contract of "a month, money," meaning, in the understanding of commercial men, payment at any time within a month.¹ (r)

2. If four or five merchants remit to one factor distinct parcels of goods, which he disposes of jointly to one person, who pays a moiety down, and contracts for the rest at a certain time, before which time the factor fails, the principals shall bear the loss proportionally amongst them.² So where a person buys goods of a broker without the knowledge of the principal; and being also indebted to the broker for another parcel of goods purchased of a different owner through his intervention, makes a payment to the broker generally, which is larger than the amount of either demand se-

¹ *Favenc v. Bennett*, 11 East. 36.

² *Malyne's Lex. Mer.* 81, 82.

(r) In a late case, where the plaintiffs, who were brokers, purchased by order of T. & Co. from Ryder, to whom they were known as brokers, 110 bales of cotton, and the contract was regularly entered in their books as a purchase and sale by brokers, and brokerage charged to both parties, but the bought and sold notes delivered, did not disclose the names of the principals, but charged brokerage to both, and the principals were not known to each other as concerned in the transaction. The plaintiffs having paid Ryder for the cottons, handed them over to T. & Co., with a bill of parcels in their own names; and it was held, under these circumstances, that the plaintiffs were principals, both in the purchase and the sale. *Kilby v. Wilson*, 1 R. & M. 178.

In a very recent case it was held, at *Nisi Prius*, that if a broker make a contract for the purchase of goods, and deliver by mistake a bought note to each party, and do not mention his principal's name, but make a proper entry of it in his own book, that the buyer who was the principal of the broker, might maintain an action for the breach of this contract. *Gale v. Wells*, 1 Carr. 388.

parately, if but less than the two together, and afterwards the broker stops payment, such payment ought to be equally apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. ¹ (v) *Johnson*

Where a man appoints an agent generally, he is bound by all his acts; (s) but where the agent's authority is limited, there the principal is only bound to the extent of his authority: and therefore, where one Briggs, a broker, bought a quantity of silk for the defendant at the plaintiff's sale; the defence to an action for the price was, that the orders to Briggs were, to buy the best Bengal raw silk, whereas this was not raw silk, nor of the best quality. Lord Keynon took the distinction between a general and special agent; that in the first case, the principal must be bound by all his acts, whereas in the latter, he is only bound while the agent acts within the scope of his authority; and that if, in the present case, the defendant could prove that he had so specially authorised Briggs to bid for him for the best Bengal silk, and this turned out not to be of

¹ *Favenc v. Bennett*, 11 East, 36.

² *East India Company v. Hensley*,
1 Esp. 111.

(s) In a late case, where the defendant, a linen-draper in Yorkshire, had in several instances employed a person as his agent to purchase on credit goods of the plaintiffs, who were linen-drapers in London, and the agent without the authority of the defendant, ordered goods in his name, to be sent by the usual conveyance, and then intercepted them to his own use; it was held, at Nisi Prius, that the defendant was liable for such goods, he having by the previous dealings with the plaintiffs and other parties, held out that person as his general agent to purchase goods. *Todd v. Robinson*, 1 R. & M. 217. *Gilman v. Robinson*, 1 R. & M. 226.

that description, that he should not be bound by this contract so made without his authority; but that Briggs should be liable to an action at the suit of the Company for the abuse of it. (f). This will also be seen in the following cases:

(f) A principal is bound by the acts of his broker, in all cases within the limits of the authority with which he is *apparently* invested, although that authority may be greater than what the principal intended to confer on him. Thus, where a purchaser of hemp lying in wharfs in London, had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp; this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal; and also that the same was the case where the hemp had been transferred into the names of the principal "or" broker. *Pickering v. Busk*, 15 East, 38.

And where brokers had been in the usual habit of buying and paying for, and of selling and receiving the value for sugars on speculation in their own names, and on their own judgment, for their principals; sometimes when the market was low, under an unlimited authority as to quantity and price, at other times under special instructions to buy; but guided from time to time by special directions to sell, and limited in respect to price, and advised from time to time by their principal, as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received from him, without accounting separately for each lot purchased and re-sold; it was held, that they might bind their principal by a resale of a particular parcel of sugars, before purchased and paid for in their own names, and lodged in their own warehouses, though sold under the price directed by their principal, for whom they received the money, but afterwards failed; for the general authority of brokers to sell, so as to bind their principals in respect of the purchaser, is to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Whithead v. Tuckett*, 15 East, 400.

But if the owner of goods send them to a wharf, whose owner is a dealer in the same sort of goods, and he sells them as his own, it is not such a sale in market overt as will pass the property to the vendee; and it would seem that it will make no difference if the wharf be in London. *Wilkinson v. King*, 2 Camp. 335.

Action on the case for breach of contract.¹

The contract in question had been made at Stortford market, and was in the following words :—“ *Sold Mr. George Hankin three hundred and twenty quarters of Hicks’ malt at seventy-four shillings. (Signed) J. Taylor.*” —Taylor was a malt-factor at Bishop’s Stortford, and had been employed by the plaintiff to sell the malt; he accordingly entered into the contract with *Joseph Hankin*, to whom he delivered a copy of the sale-note. Joseph Hankin was the son of the defendant. It appeared that he had done his father’s business, and made his contracts at market for many years. The defence relied on was, that Joseph Hankin was the agent for his father under a limited authority, which he had exceeded. The instructions from old Hankin to his son were produced, by which it appeared that he was authorised to give sixty-four shillings and sixpence per quarter only. Joseph Hankin, however, on his cross-examination, admitted, that notwithstanding the written instructions he had received, he did consider himself at liberty to exceed the price fixed. Heath J. —Though a special agent, acting under a limited authority, cannot bind his principal, if he exceed his authority, such special agent must be expressly limited as to price; if he is at liberty to exceed the limits, he is not a special agent. Mr. J. Hankin admits that he did not consider himself as bound by the direction in writing of his father; he considered himself at liberty to exceed that authority; and I am, therefore, of opinion, that his principal is bound.— But where the holder of a bill of exchange², desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the

¹ *Hicks v. Hankin*, 4 Esp. 114.

² *Penn v. Harrison*, 5 U. R. 107.

same purpose, informing him to whom it belonged, and B. finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A.'s telling him that he would indemnify him; the indorsee took the bill upon the credit of the names upon it, without any knowledge of the real owner. Although the original owner afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the indorsee, it being *nudum pactum*; for as he was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. Though, if an agent be employed to get a bill discounted, without any restrictions as to the mode of doing it, and he warrant it to be a good bill, his employers are bound by his act, and are liable to refund if the bill be afterwards dishonoured by the acceptor.¹

If a man intrust a servant or agent to sell for him, he is intrusted to do all that he can to effectuate the sale; (u) and if he does exceed his authority in so doing, he binds his principal. Thus,

In an action of assumpsit on the warranty of a horse sold by the defendant to the plaintiff.² The warranty was, "that the horse was seven years old, and free from vice." The horse had been sent to Tattersall's; had been inserted in his catalogue as for sale, and described as seven years old. He had not, however,

¹ *Penn v. Harrison*, 4 T.R. 177.

² *Helgey v. Hawke*, 5 Esp. 72.

(u) If a factor, even acting without a *del credere* commission, chooses to indorse a bill of exchange, which he is directed to procure for his principal, he is liable to the latter as an indorser. *Goupy v. Harding*, Holt, 342.

been brought to the hammer; but had been sold by private contract to the plaintiff by the defendant's groom, before the auction. [The evidence as to the warranty was, that the plaintiff, having Tattersall's catalogue in his hand, went to the defendant's groom, who was then at Tattersall's taking care of his master's horse. . . He had the horse brought out, and asked the groom if he was but seven years old? He said, "Yes." If he was free from vice? The groom said, "Yes: he is, if you have him." The horse was then led back. Nothing was said about the price at that time, but the horse was soon afterwards delivered. The evidence of the groom's declarations having been objected to, Lord Ellenborough ruled, that if a servant is sent with the horse of his master, and which horse is offered for sale, and gives directions respecting his sale, he thereby becomes the accredited agent of his master, and what he says at the time of the sale, as part of the transaction of selling, respecting the horse, is evidence; but an acknowledgment to that effect, made at another time, is not so; it must be confined to the time of the actual sale, when he was acting for his master. Nothing having been said about the price at the conversation between the plaintiff and the defendant's servant, so as to form a complete contract for the sale of the horse, upon which the warranty could act, other evidence was given, which did not after all prove the warranty: but Lord Ellenborough, in answer to an objection taken at the bar, said, I think the master, having intrusted the servant to sell, he intrusted him to do all that he could to effectuate the sale; and if he does exceed his authority in so doing he binds his master. It was afterwards proved that there was no warranty; but that the horse

was to be taken with all faults; and the plaintiff was nonsuited.

In an action on the warranty of a horse sold by the defendant's servant to the plaintiff, *warranted sound*; it was insisted that the plaintiff should begin, by proving the servant's authority to warrant. But Lord Ellenborough said, "If the servant was authorised to sell the horse and to receive the stipulated price, I think he was incidentally authorised to give a warranty of soundness. It is now most usual on the sale of horses, to require a warranty, and the agent who is employed to sell, when he warrants the horse, may be fairly presumed to be acting within the scope of his authority. This is the common and usual manner in which business is done, and the agent must be taken to be vested with power to transact the business with which he is intrusted in the common and usual manner. I am of opinion, therefore, that if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty." (v)

A master of a ship, who is the agent of the owners, has not, as such, any power to sell the ship²; and, consequently, his sale transfers no property: and it seems that he has no implied authority to do so, even in a case of a seeming necessity, from the ship's being unseaworthy, and, in the opinion of persons of competent

¹ *Alexander v. Gibson*, 2 Camp. 555.

² *Johnson v. Shippen*, 2 Ld. Raymond, 984.

(v) And in another case it was held, that the representations made by an agent at the time of making a contract, or whilst acting within the scope of his authority, are admissible as evidence against the principal. *Peto v. Hague*. 5 Esp. 134.

knowledge in those matters, unable to perform the voyage home; but even if any such authority is to be implied under such circumstances, if the ship specially subsist, and is capable of being used for the purpose of navigation, such sale is not valid, unless the forms prescribed by the Ships' Register Acts are complied with; and no power to sell can be derived under a decree of the Courts of Vice Admiralty abroad, upon the petition of the captain, and survey, &c.¹ Neither has the captain any authority to assume to himself the character of agent to the owner of the cargo, and upon the voyage being lost, to dispose of the goods on account of the owner: and it was so ruled in the following case:—

Action against the defendants², as owners of the ship *Ranger*, on a bill of lading signed by their captain for two cases of cutlasses, to be carried from England to Surinam, "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted." The *Ranger* sailed in June, 1807, under convoy of the *Julia* sloop of war, with a large fleet for the West Indies, among which were four vessels for Surinam, besides herself. She strictly followed, during the voyage, the directions of the commodore whose duty it was to inform different ships when they were to separate for their respective ports of destination. Through the error of the commodore the Surinam ships got to the leeward of that settlement, and having ineffectually attempted to beat up to windward, were forced to put into Demarara, in the end of August, and to remain there till the month of December, when a ship of war came to see them back

¹ *Reid v. Darby*, 10 East, 145.

² *Van Omeron v. Dowick*, 2 Camp. 42.

to Surinam. They sailed with her; but after nine or ten days' beating about were carried further to leeward. The commodore then finding the attempt hopeless, ordered them to make for Tobago or Grenada. The Ranger put into the latter island, where the goods in question were sold by public auction under the directions of the captain. The Attorney-General, for the defendant, contended that the captain under such difficult circumstances, was to be considered as the agent of the shipper, as well as the ship-owners, and that he had discretionary authority to do what was best for all concerned: that it was clearly for the benefit of the plaintiff, that the cutlasses should be sold at Grenada, since they could not be carried to Surinam: he could, therefore, only claim the sum for which they were sold, and the action could not be maintained: that the defendants had not been guilty of any breach of their undertaking, for the ship had done every thing that was possible to reach Surinam, and had been prevented from delivering the goods there by one of the risks excepted in the bill of lading. Lord Ellenborough. — I am decidedly of opinion that you have no right to sell the goods. Expediency might require this step; but the captain could not put himself in the situation of the owner of the goods; and when he thus disposed of them, in point of law he was guilty of a tortious conversion. Whatever power he might have to sell part of the cargo for repairs, he could not lawfully put a stop to the voyage; and it is difficult to say that there was a natural impossibility of proceeding to Surinam. (w)

(w) The authority of a broker may be countermanded at any time before a memorandum of the contract of sale is signed by him, pur-

Although the general principle of law is, that the principal is civilly responsible for the acts of his agent¹, yet, as such responsibility arises from an authority from the principal, express or implied, to do those acts, it would seem he is not liable for a fraudulent misrepresentation made by the agent, for no authority to deceive can be implied from the nature of the agent's employment. And therefore it was held, that if a servant sold false stuff, an action on the case did not lie against the master, unless he sold it through his covin, or by his command²; but in a subsequent case³, where, in an action on the case for a deceit, in selling silk of one kind for another, it appeared, that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea; the doubt was, if this deceit could charge the merchant. And Lord Holt C. J. was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts trust and confidence in the deceiver should be the loser than a stranger; and upon

¹ Per Ld. Kenyon, in *Doe v. Martin*, 4 T. R. 66.

² Bro. Ab. Action on the Case, pl. 8.

³ *Hern v. Nichols*, 1 Salk. 289.

suant to the statute of frauds, even although he has previously entered into a verbal agreement to sell the goods. *Farmer v. Robinson*, 2 Camp. 339. n. And where his authority is countermanded in the case of a marine insurance, after the slip, but before the policy is signed, and he pays the premium, he cannot recover the amount from his employer. *Warwick v. Slade*, 3 Camp. 127..

And in avoidance of a sale made by a broker, it may be shown, that by the usage of that particular trade, the authority to sell expires with the day on which it is given. *Dickenson v. Lilwal*, 4 Camp. 279.

this opinion the plaintiff had a verdict. And this is agreeable to the rule of law, that where one of two innocent persons must suffer by the fraud of a third person, the one who enables such third person to commit the fraud must bear the loss.

We have seen that where a factor sells goods under a *del credere* commission, he is personally liable to his principal for the price; and so there are many other cases in which factors, brokers, &c. may be personally liable upon contracts made on account of principals: as, where the principal resides abroad¹; where an auctioneer sells goods without naming his principal²; or where an agent has notice that the property he is about to sell does not belong to his principal, notwithstanding which he continues to sell³: and so, though the owner of a ship is bound by the contract of the master for necessities supplied for the use of the ship, yet the captain is also personally liable⁴: but, where goods are ordered for a ship by the owner, before the appointment of the captain, though some were not delivered till afterwards, yet, as no personal credit was given to the captain, he was not held answerable for any of them.⁵ (x)

Where a factor, having a general authority, gives a man time for the payment of money due for his prin-

¹ *De Gaillon v. L'Aigle*, 1 B. & P. 357.

² *Hanson v. Roberdeau*, Peake, 120.

³ *Hardacre v. Stewart*, 5 Esp. 105.

⁴ *Molloy de Jure Marit.* 224. 228. and *Rich v. Coe*, Cowp. 636.

⁵ *Farmer v. Davies*, 1 T. R. 108.

(x) And if it appear in any case, that the credit was given to the owners alone, and that the master merely acted in the transaction as their servant, he will not be liable. *Hoskins v. Slayton*, Cas. temp. Hardw. 376.

principal's goods, and after the credit is expired, sells him goods of his own for ready money, and the vendee becomes insolvent; the factor is not personally liable to his principal, though he is bound in honesty to indemnify him.¹ Neither is a public officer contracting as agent of the government personally liable on contracts made by him in that capacity (y); even though he contract by deed.²

¹ *Molloy de Jure Marit.* 440.

² *Unwin v. Wolsey*, 1 T. R. 674.

(y) The following cases have been decided upon the subject of contracts entered into by persons in public situations, as the agents of government, and other public bodies, and may, perhaps, form an useful addition to the text in this place.

1. A governor of Quebec was held not to be personally liable for forage furnished to a lieutenant-governor commanding a fort within his province. *Macbeath v. Haldimand*, 1 T. R. 172.

2. It was held, that an action brought by a person who had been employed by a commissary in his office, would not lie against the commissary for forage furnished to the army. *Lutterloh v. Halsey*, 1 T. R. 180. n.

3. A captain of a troop was decided not to be liable for subsistence furnished to the men during his absence, and whilst another officer was in the actual command of the troop, and by whom the orders for subsistence were issued, and the subsistence money received from government; although such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beaver*, 1 East, 134.

4. The captain of a troop, for which forage is furnished by the orders of a clerk appointed by such captain, is not liable for such forage, although present with the troop at the time; if it does not appear that he has received any money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum, regulated by the returns of the preceding month. *Rice v. Chute*, 1 East, 579.

5. But where the captain has, in fact, received such money, he is liable to the seller. *Rice v. Everitt*, 1 East, 583. n.

6. The liability of the colonel of a regiment for knapsacks furnished to the regiment by his order, depends upon the question

Before we quit the subject of factors, it may be proper to notice a legislative regulation with respect to a particular class of them. By stat. 31 G. 2. c. 40. s. 11. factors employed to buy or sell *cattle* by commission, are prohibited from buying, either directly or indirectly, on their own account (except for the necessary use of their families), live cattle, sheep, or swine, in London or within the bills of mortality, or at any place whilst the cattle are on the road to London for sale, and from selling either by themselves or their agents such cattle, &c. in London, or within the bills of mortality, under the penalty of double the value of the cattle sold.

It may also be proper here to point out in what cases a master may be bound by the contracts of his servant.

It may be laid down as a general rule, that a master is bound by all contracts entered into by his servant, acting under his express or implied authority.¹ And such authority will be implied from the master having once affirmed the contract of the servant, by paying

¹ F. N. B. 120. G. Doc. and Stud. dial. 2. c. 42. Noy's Max. c. 44.

whether they are supplied upon his personal credit; for where a tradesman who furnishes necessaries to a regiment, looks to the regimental fund as a medium through which he is to obtain payment, though by the assistance of the colonel, the latter is not personally liable. *Prosser v. Allen*, 1 Gow. 117.

7. A magistrate is not liable to pay for plans and estimates for building a county jail, upon an employment by him as one of a committee appointed under an order of sessions. *Tuck v. Ruggles*, 5 Esp. 237.

8. Where justices under the provisions of an act of parliament, contracted for the rebuilding of a county bridge, it was held that they were not individually liable on such contract. *Allen v. Waldergrave*, 8 Taunt. 566.

for goods bought by him on trust¹; but if a master give his servant money to buy goods for his use, and the servant buy on credit, and embezzle the money, (if the master has never sent his servant to buy on credit) he is not liable to pay it again. Thus, where the defendant² contracted with the plaintiff (who was a butcher) for all kinds of meat at a certain price for *ready money*. (z) The cook maid was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea used to pay it; in general she paid once a week, on a Monday morning; and the defendant always gave the servant money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the defendant as above stated. At length the defendant got another cook maid, and gave her money as usual, but she did not pay the bills as others had done, but suffered them to be in arrear thirty-three pounds three shillings and three-pence. She then ran away from the defendant's house, after which the defendant was called upon, for the first time, to pay this sum of money.

Lord Kenyon said, nothing could be clearer than that when a man gives his servant money to pay for commodities as he buys them, if the servant pocket that money, his master will not be liable to pay it over again.

¹ *Hazard v. Treadwell*, 1 Str. 506.

² *Stubbing v. Heintz, Peake*, 47.

(z) And in a late case, a master was held not to be liable for brandy ordered by his butler in his name, unless he had been in the habit of paying for goods ordered in the same manner before, or had in some way authorised his servant to buy on credit. *Maunder v. Conyers*, 2 Stark. 281.

But if the master employ his servant to buy things on credit, he will be liable to whatever extent the servant may pledge his credit. Here the contract between the parties was to deal for ready money; and the plaintiff, when he let the bill run on to such an amount as the sum claimed, was giving credit to the servant and not to the defendant. The defendant had not entered into any new contract, but still thought he was dealing on the same terms as before. — Verdict for defendant. (a)

But when a man has been in the habit of dealing with a tradesman on credit, unless he give notice to the tradesman that in future he will pay ready money, he will remain liable for any goods delivered to his servant. And notice of alteration in the mode of dealing to the tradesman's servant is not sufficient.¹ (b)

But if a servant employ a tradesman to do any work, *who has never been employed by the master*, and the tradesman does the work without any communication with the master, though the work was done to the

¹ *Grattand v. Freeman*, 3 Esp. 85.

(a) A master who furnishes his servant *before hand* with money for the purchase of goods, is not liable for goods taken upon credit; but where the master advances money on account generally, and does not always keep the servant in cash, he gives the servant a right to pledge his credit, and will be liable to a tradesman, although the servant may have in fact received money sufficient to have paid the demand. *Busby v. Scarlett*, 5 Esp. 76.

(b) In another case at Nisi Prius, where the master was in the habit of paying ready money for part of the goods furnished by a tradesman to his servant, it was held to be sufficient notice to the tradesman that the master considered those goods only as furnished to his family, and that he was only liable for so much as came to his use. *Pearce v. Rogers*, 3 Esp. 214.

master's property, he is not liable¹(c); for in such case the authority of the master cannot be implied. And in no case can an agreement between the master and servant alter the liability of the former as to third persons; and therefore where, in an action for work and labour by the plaintiff, who was a smith and farrier, the defence was, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with medicines when necessary: Lord Kenyon said this was no defence to the action, *unless the plaintiff knew of this agreement*, and expressly trusted the groom; for a tradesman has nothing to do with any private agreement between the master and servant.²(d)

¹ *Hiscox v. Greenwood*, 4. Esp. 174.

² *Precious v. Abel*, 1 Esp. 350.

(c) But where the coachman of a party went in his master's livery and hired horses, which his master used, it was held that the master was liable to pay for the hire, although he had agreed with his coachman to pay him a large salary to provide horses and his own livery, and every thing connected with the carriage, unless the lender of the horses had some notice that the coachman hired them on his own account, and not for his master. *Rimell v. Sampayo*, 1 Carr. 254.

(d) Where a servant has usually accounted with her master for monies received to his use, without any written vouchers, to charge the servant with money received, it is not sufficient to show that particular sums have come to her hands, but it must be also proved that she has not paid them over. *Evans v. Winifred*, 3 Camp. 10.

CHAP. III.

OF THE VENDOR'S PROPERTY IN THE THINGS SOLD.

IN considering the contract of sale with reference to the vendor's interest in the thing sold, it will be necessary to contemplate it in this twofold point of view: 1st. Where the vendor hath in himself the property of the thing sold; and, 2dly, Where he hath not.

SECT. I.

Of Sales where the Vendor hath the property of the thing sold : which is either

- | | |
|-------------------------|------------------------------|
| 1. <i>Absolute</i> , or | 3. <i>In Possession</i> ; or |
| 2. <i>Qualified</i> . | 4. <i>In Action</i> . |

1. WHERE a man hath the *absolute* ownership in possession of any goods, it follows that he hath also, as incident to such ownership, the right of disposing of them in any manner he may think proper. In cases, however, where a judgment has been obtained against a man for any debt or damages, the person who has obtained such judgment has a lien upon the property

of the person against whom it is given, for the satisfaction thereof. At common law, this lien accrued from the teste of the writ of execution, so as to bind the property of the goods, and prevent the party against whom judgment had been given, from making any intermediate disposition of it to defeat the execution of such judgment¹; so that if the goods were afterwards sold, though *bonâ fide*, and for a valuable consideration, they are still liable to be taken in execution, into whose hands soever they came.² (c) But it would seem that this was the rule, only where the execution followed the judgment in the usual course; and that a person who had obtained judgment, wilfully delaying his execution for any length of time, and after a sale to a *bonâ fide* purchaser, issuing his writ tested the term judgment was signed, should not have the benefit of this relation to the teste of the writ to defeat such sale³; which practice, though manifestly unjust, appears to have been very prevalent; for when the statute of frauds was under discussion in parliament, it was said, "that the mischief was great, that in long vacations, when goods have been sold in market overt, or taken upon a distress, &c., a *feri facias*, tested the last term, should come and overreach them."⁴ To remedy

¹ Year-book, 19 H. 8 pl. 10. Moore, 57. Fleetwood's case, 8 Rep. 171. Farrer v. Brooks, 1 Mod. 188.

² Farrer v. Brooks, *suprà*. Baskerville v. Bocket, Cro. Jac. 451.

³ Bayly v. Bunning, 1 Lev. 174.

⁴ Per Treby Ch. J. in Houghton v. Rushby, Skin. 257.

(c) A judgment signed in any part of the term, or the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and an execution against the goods of the defendant may be taken out upon it, tested the first day of the term. *Bragner v. Langmead*, 7 T. R. 20.

which mischief, it was enacted by the statute of 29 Car. II. c. 3. s. 16., "that no writ of *fiery facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ (without fee for doing the same), indorse upon the back thereof the day of the month or (*f*) year whereon he or they received the same."

But neither before this statute nor since, is the property of the goods *altered* till the writ is executed: the meaning of the statute is, that if the party against whom a writ of execution is issued, after such writ is delivered to the sheriff, make sale of his goods, *unless in market overt*, the sheriff may still take them in execution as the goods of the vendor¹; and therefore where, in the begining of this section, it is said, that where a man hath property in goods he may sell, unless judgment has been obtained against him, &c., it must not be understood that in the case excepted, the sale *as between vendor and vendee* would not be good, but only that in such case, the vendor cannot transfer an *indefeasible* right to the thing sold, but assigns subject to the lien of a third person under the judgment, except

¹ 2 Eq. Cases. Abr. 381.

(*f*) Although the word "or" is used in the roll it is obviously a mistake, and ought to have been "and," and so it is treated in the authoritative edition of the statutes.

the sale be made in *market overt*, as by a shopkeeper in London in the usual course of his trade. (g)

The statute being made in favour of purchasers¹, a purchaser seeking to protect himself under it, must be a *bond fide* purchaser for a valuable consideration, and not claiming under a fraudulent sale; for in such case, the goods are still liable to the execution in the hands of such fraudulent vendee; and the vendor continuing in possession as the visible owner of the goods after the sale, is a strong badge of fraud, and avoids such sale as against creditors.² So that if a creditor seize the goods of his debtor under a *fieri facias*, and suffer them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution; it has been held that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable to the second execution.³ Unusual privacy in the sale is another circumstance from which fraud may be inferred.⁴

Hence we may lay it down as a general rule, that a man who has property in goods and chattels, has an absolute and indefeasible right of disposition of such goods, until a writ of execution against them is actually lodged in the sheriff's office; and even afterwards, until actually seized by the sheriff, provided they are *bond*

¹ *Anon.* 2 Vent. 218. *Houghton v. Rushby*, Skin. 257.

² *Twyne's case*, 3 Rep. 82. Godb. 161. *Edwards v. Harben*, 2 T. R. 587. *Paget v. Perchard*, 1 Esp. 205.

and *Phillips v. Eamer*, *ibid.* 557-8. B. N. P. 258. Prec. in Chan. 286-7.

³ *Ibid.* 1 Ves. 245. 456.

⁴ *Twyne's case*, 3 Rep. 81.

(g) By the civil law, the vendee acquired no property in goods sold in fraud of creditors, if he was privy to the fraud. *Ff. l. 18. tit. 1. 26.*

fide sold in market overt, to an innocent vendee, without notice of the execution.

As, however, the King is not specially named in the statute of frauds, he is not bound by it¹; consequently *extents* at his suit remain as at common law, and bind the goods of his debtor from the teste².

It may be well here to remark, that goods and chattels remain liable only to executions against the immediate vendor, and not to those against the person of whom he purchased, though the first sale (made before the delivery of the writ to the sheriff) may have been fraudulent, and not entitled to the protection of the statute, provided the second sale is *bonâ fide*. Thus much for absolute property in possession. Our next division of the vendor's property may again be subdivided into qualified property with respect to the subject matter; and qualified property with respect to the peculiar circumstances of the owner.

First, then, a man may be invested with a qualified property in all creatures which are *feræ naturæ*; either *per industriam*, *propter impotentiam*, or *propter privilegium*.³ *Per industriam*, as in animals which are *feræ naturæ*, though tamed and confined by the industry of man; such as deer in a park, (*h*) hares or rabbits in an

¹ Year-book, 2 H. 4. 14.

² 2 Blac. Com. 391.

³ *Fleetwood's case*, 8 Rep. 171.
The King v. Mann, 2 Str. 754.

(*h*) Thus, it has been decided in the Court of Common Pleas, that deer in an inclosed park may be distrained for rent; from which it would seem, that although, perhaps, they are not actually tamed, a man may have an *absolute* property in them, whilst restrained from their natural liberty by the inclosure. *Davies v. Powell*, Willes, 46.

inclosed warren, doves in a dove-house, pheasants or partridges in a mew, or fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his actual possession; but if they at any time regain their natural liberty his property instantly ceases¹: though, according to the opinion of Grotius, loss of property in wild animals reclaimed, does not immediately follow upon their escape; but on account of the great difficulty of recovering them, a man may well be supposed to have abandoned his right to them²; which seems to accord well with the civil law³, and our own⁴; for while the owner is in the pursuit of them he still retains his property, as the act of pursuit rebuts the presumption that he has abandoned his right.

Animals, however, which have *animus revertendi* are considered in a different light. "*In iis autem animalibus quæ ex consuetudine abire et redire solent, talis regula comprobata est: ut eousque tua esse intelligantur, donec animus revertendi habeant, nam si revertendi animus habere desierint, etiam tua esse desierunt, et fiunt occupantium. Revertendi autem animus videntur desinere habere tum cum revertendi consuetudinem deseruerint.*"⁵ To the same effect, and almost in the same words, speaks Bracton⁶: Amongst this class of animals, Bracton reckons deer, swans, peacocks, doves, &c. So, a tame hawk that is pursuing his quarry in the owner's presence, though he has liberty to go where he pleases, is still the property of the original owner, for he has *animus revertendi*. But if animals having the

¹ 2 Blac. Com. 392.

² Lib. 2. c. 8. § 3.

³ Ff. l. 41. t. 1. § 5.

⁴ Bracton, l. 2. c. 1. Finch, L. b. 2. c. 17.

⁵ Inst. l. 2. t. 1. 15.

⁶ L. 2. c. 1. p. 9. and see the cases of Swans, 7 Rep. 17.

animus revertendi stray without the owner's knowledge, and do not return in the usual manner, they again become common, and it is lawful for any one to seize them for his own use.¹ But if a deer, or other wild animal reclaimed, hath a collar or other mark put upon him, and go and return at his pleasure; or if a wild swan be taken and marked, and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him²: which agrees with the opinion of Grotius (before cited), that the owner of animals reclaimed *per industriam*, does not lose his property therein by the mere act of such animals' escape out of his actual possession, where the owner does any act to rebut the presumption that he has given up all hopes of recovering the possession of such animals: but if the swan leaves the neighbourhood, or the deer has been long absent, so that all reasonable hopes of his return are gone, the former owner has no longer any property in him.³

Bees are also *feræ naturæ*, and consequently, when in actual possession, may be the subject of a qualified property; but whether such qualified property may be acquired *per industriam hominis*, by hiving and reclaiming them, or exists only *ratione soli*, is a point upon which the books are at variance.

Puffendorf lays it down, "that bees are no doubt wild by nature, since their custom of returning to the hive, doth not proceed from their familiarity with mankind, but from their own secret instinct; they being in all other respects utterly unteachable."⁴ Pliny asserts, that bees are neither wild nor tame⁵; whilst others con-

¹ Finch, L. b. 2. c. 17. p. 177.

² 2 Blac. Com. 592. Case of *Swans*, 7 Rep. 16. and see Grotius, l. 2. c. 8. § 3.

³ 2 Blac. Com. 592.

⁴ L. 4. c. 6. § 5.

⁵ Hist. Nat. l. 11. c. 5.

sider them to be of both kinds ; thus the Digest ¹ speaks of "*apes feræ*," which are not the subject of theft, in contradistinction to tame bees, which obviously are ; but I apprehend the distinction between wild and tame bees, as different in species, to be totally without foundation.

All bees are no doubt wild by nature, but when hived and reclaimed there seems to be no good reason why a qualified property may not be had in them, as well as in deer or any other animals *feræ naturæ*. Indeed, in very early times we read of them as the subject of property ; thus, one of Plato's laws directs, that whoever deprives another of this species of property, either by pursuing them, or striking upon brass to entice them by the sound, should make restitution for the damage.² And while bees are reclaimed, and return regularly to the hive, they were so far considered as the property of the owner by the Roman law, as to entitle him to legal redress against any one who might injure them, as appears from Quintilian's oration, entitled, "The Poor Man's Bees."³ And the manner of acquiring this property is expressly stated, in the Institutes to be by hiving and inclosing them. "*Apium quoque fera natura est. Itaque apes quæ in arbore tua consederint, antequam à te alveo includantur non magis tuæ intelliguntur esse quam volucres, quæ in arbore tuâ nidum fecerint ; ideoque si alius eas incluserit ; is earum dominus erit.*"⁴ This passage is literally copied by Bracton, who adds, "*Examen etiam quod ex alveo meo evolaverit eò usque meum esse intelligitur quamdiu in conspectu meo est, nec sit impossibilis ejus persecutio est, alioquin occupantis fit*"⁵ ; in which he has also followed the civil law.⁶ But even should they escape, and any

¹ L. 47. t. 2. l. 26.

² De Leg. l. 8.

³ Decl. 13.

⁴ Inst. l. 2. tit. 1. § 14. and see FF. l. 41. l. 5.

⁵ Lib. 2. c. 1. § 3.

⁶ FF. l. 41. tit. 1. 4.

one seize them; he does not thereby acquire any property in them, if he know them to be another's; but such taking is esteemed a theft, unless taken with the design of restoring them to the true owner¹; which is a confirmation of the opinion of Grotius, that property in animals *feræ naturæ*, may subsist even after they have recovered their natural liberty, without the intention of returning, whilst there is any hope of recovering them; as from the circumstance of their having what the lawyers call "an ear mark," or their being by any other means generally known to belong to any individual; for by these means the chance of recovering the fugitives is greatly increased.

Notwithstanding the authority of Bracton and the civil law, it is said in Brook's Abridgment², that the only ownership of bees is *ratione soli*; and the charter of the forest, says Mr. Justice Blackstone³, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found. But it would rather seem, that what is said by Brook, must be intended for bees unreclaimed, of which the qualified property may be in the owner of the soil on which they are found, as fish in a river, in which a man has a several fishery, in which case he has a qualified property in the fish while they remain within the limits of his fishery, *ratione soli*; and it is worthy of remark, that Brook's observation is general, that no property can be in animals *feræ naturæ*, as fish, bees, &c., except *ratione soli*; but I think this

¹ Bracton, *suprà*.

² Tit. Propertie, 37. cites 45 Edward 3. 24.

³ 2 Com. 393.

passage in Brook will hardly be vouched to prove that a man cannot have a property in fish inclosed in a pond ; though it will be as good an authority for that purpose, as to prove that the property of *all bees* must be *ratione soli*. — As to the charter of the forest, that only gives the *honey* to the owner of the forest ; which, had the property of the bees been in him, would have been unnecessary : from this charter, therefore, it may rather be inferred, that not only the bees, but their produce, were considered as common property. Had it been understood as either recognizing or confirming a right to the bees in the owner of the soil, to the exclusion of all others, it would surely not have escaped the notice of Bracton, whose book was written shortly after the making of the charter of the forest.

In support of the opinion, that a property may be acquired in bees by hiving and reclaiming them, we may refer to the Register¹, where there is a writ of *replegiare facias* for a swarm of bees. Now, it is laid down by Lord Coke, that a distress must be of a thing whereof a valuable property is in somebody ; therefore, animals *feræ naturæ* are not distrainable², unless *reclaimed* ; for then, if taken, the owner may have a replevin.³

A qualified property, *propter impotentiam*, may also subsist with respect to animals *feræ naturæ* ; as where hawks, herons, or other birds, build in a man's trees, or coneys, or other creatures, make their nests or burrows in his land, and have young ones there, he hath a qualified property in such young ones, till such time as they can fly or run away, and then such property expires.⁴ In

¹ P. 81. and see also F. N. B. 68. E. Co. Lit. 47. b.

² Roll. Abr. tit. Repl. A. 430. Bro. Abr. tit. Repl. pl. 64. Doc. Plac. 314.

⁴ *Carta de Foresta*, 9 H. 3. c. 13. F. N. B. 86. L. 89. K. Case of Swans, 7 Rep. 17.

this case, as the owner of the land has it in his power to do what he pleases with such animals, the law vests a property in him of the young ones, in the same manner as it does of the old ones, if reclaimed and confined; for these cannot, through weakness, any more than the others through restraint, use their natural liberty, and forsake him.

Lastly, a man may have a qualified property in wild animals *ratione privilegii*; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of all other persons, as by reason of a park, warren, &c. But in such case (it is said²), a man hath no property in the deer, conies, pheasants, or partridges: And therefore, in an action *quare parcum warrennum, &c. fregit, &c. et tres damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say *suos*, for he hath no property in them: but they do belong to him *ratione privilegii*, for his game and pleasure, so long as they remain in the privileged place.

Where a qualified property is acquired in animals *feræ naturæ*, either *per industriam*, or *propter impotentiam*, it will be seen that such property is in its nature possessory³; and, by consequence, may be the object of a sale, gift, &c. But with respect to property subsisting *ratione privilegii*, the case is different; the transient property which by this means may be acquired in animals *feræ naturæ*, not being accompanied with possession, cannot be transferred by sale, though the privilege itself may. But as such privilege is in the nature of a franchise, the manner in which it may be transferred would be foreign to the subject of this work, which is confined exclusively

² 2 Blac. Com. 594.

³ Case of *Swans*; 7 Rep. 17. 3 H. 6. N. B. 86. L. 89. K. Doc. Plat. 514.

55. 6.

to the sale of personal chattels. If, however, the owner of the franchise reduce the animals into possession by taking or killing them, it is almost needless to observe, that such property may then be transferred from hand to hand in the same manner as other personal property, unless such right is restricted by statute, as in the case of game, as we shall have occasion to observe in the sequel:

A qualified property may also be had in personalty, on account of the peculiar circumstances of the owner, where the thing itself is capable of absolute ownership. Thus, bailees, as carriers, agisters of cattle, &c.¹ have a qualified property in the thing bailed. So, a lord who seizes a wreck, or estray, hath a special property therein before the year and day expired.² A sheriff, also, has a special property in goods seized in execution.³ So, an auctioneer, a factor, or other consignee, a trustee, or pawnee⁴, may all have special property in goods. But care must be taken to distinguish between a bailee, and a mere servant who has the care of his master's goods, as a butler of plate, a shepherd of sheep, and the like, who have no property, either absolute or qualified, but only a charge or oversight⁵: for it is said, that if a bailee or other person who has a special property, sell and deliver the goods to another, *bona fide*, and without notice, the general owner cannot maintain trover or any other action against the vendee; because, by such a sale, by a person who has a special property in, and possession in fact of the goods, the property of the

¹ Bro. Tres. 92.

² Sir Wm. Courtney's case, C. B. Salk. MSS. 88. *Pye and Pleydell*, Bucks. 1750, per Clarke, Bar. S. P. B. N. P. 23.

³ *Wilbraham v. Snow*, 2 Saund. 47. 1 Mod. 30. 1 Sid. 438. Lev. 282.

⁴ Vent. 52. S. C. *Clerk v. Withers*,

6 Mod. 292. *Williams v. Millington*,

1 H. Black. 81.

⁵ *Ratcliff v. Davies*, Cro. Jac. 245.

5 H. 7. 1. *Owen*, 124.

⁶ 5 Inst. 108.

general owner is altered.¹ But this is true only in the case of a naked bailment, on account of the confidence which the bailor has reposed in the bailee by such *general bailment*, and the law is otherwise where a man bails his goods to another for a *particular purpose*²; as to a carrier, agister of cattle, a wharfinger, &c. Thus, in a case³ where the plaintiff had sent a quantity of lead to the wharf of one Ellil, in the Borough of Southwark, there to remain till it should be sold; Ellil was accustomed to sell lead from his wharf, but had no authority whatever to sell the lead in question, and never had sold any for the plaintiff before. Having sold this lead as his own property to the defendants, who bought it *bonâ fide*, the plaintiff brought trover against them. It was endeavoured to be shown that this wharf was *market overt*, as being within the metropolis, and a place where lead was usually sold. — But Lord Ellenborough C. J. held, that *the sale by Ellil did not change the property* in the lead; and observed, that the doctrine contended for, would give wharfingers the dominion over all the goods intrusted to them; that Ellil had no colour of authority to sell the lead, and no one could derive a good title to it under such tortious conversion; and the plaintiff accordingly recovered.

So, where the plaintiff bailed his goods to A. for *safe custody* only, and A. carried them to defendants, and there borrowed of them three hundred pounds, and pledged the goods as his own; it was held, that the plaintiff might maintain trover against the pawnee for such goods, though taken by him *bonâ fide* as the goods of A. without notice of the fraud.⁴

¹ Bro. Trespas, 216. 295. *Countess of Shrewsbury's case*, 5 Rep. 14.

² *Countess of Shrewsbury's case*, 5 Rep. 14. Co. Lit. 57. a. Bro. Trespas, 295.

³ *Wilkinson v. King*, 2 Camp. 35.

⁴ *Hartop v. Hoare*, 8 Ess. 1187. Wils. 8. 3 Atk. 44. S. C.

There is also another species of property, which, with reference to the duration of it, may be classed amongst qualified property, and that is literary property, or the right which an author has to the exclusive profits of his own compositions. Whether such a property subsisted at common law or not, is a point which has called forth the exertions of the greatest lawyers of this country. But how this point stood at common law, is more a matter of curiosity than real utility; for now, by the statute 8 Anne, c. 19. (amended by 15 Geo. III. c. 53.) it is declared, that the author or his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer*, unless, at the end of that period, the author himself be living, in which case he has another fourteen years. It will seem from the very terms of these acts, that this sort of property is assignable (i); and if an author transfer all his right or interest in a publication, and he survives the fourteen years, and thereby becomes intitled to a renewal of the term, the second fourteen years will result to the assignee, and not to the author¹; and the proprietors of literary property may protect it

¹ *Carnan v. Bowles*, 2 Bro. C. C. 80.

(i) An assignment of a copyright must be by instrument in writing. *Clementi v. Walker*, 3 B. & C. 861. And an agreement that a person shall have the exclusive publication of a work in England, does not make him the assignee of the copyright, nor does it entitle him to maintain any action for piracy. *Power v. Walker*, 3 Camp. 8. in which case the Court refused a rule to set aside the nonsuit, 3 M. & S. 7.

But in an action by an author, who had declared that he had parted with all his copyright, a valid assignment was presumed. *Moore v. Walker*, 3 Camp. 9. n.

by action or injunction; though the work has not been entered at Stationer's-hall, pursuant to the 8 Anne, c. 19, such entry being only necessary to enable the party injured to sue for the penalties given by the statute.¹ (k)

Musical compositions have been held to be within the meaning and protection of these statutes; the words of the statute of Anne being sufficiently large to include such compositions: "*books and other writings*," are the words made use of. It is not confined to language or letters. Music is a science and may be written; and the mode of conveying the ideas is by signs and marks; the same as algebra, mathematics, arithmetic, hieroglyphics, &c.² And a musical or other composition is within the statute, though printed on a single sheet.³ (l)

¹ Per Lord Mansfield, in *Tinson v. Collins*, 1 W. Black. 338. and *Beckford v. Hood*, 7 T. R. 690.

² *Bach v. Longman*, Cowp. 623.

³ *Clementi v. Golding*, 11 East, 244. 2 Camp. 25. S. C. *Storace v. Longman*, 2 Camp. 27.

(k) By statute 54 Geo. III. c. 156, instead of a copyright for fourteen years positively, and a contingent extension of the right for fourteen years more; authors, or their assigns, have now a certain copyright in their works for twenty-eight years in the first instance, and if the author be living at the end of that time, for the residue of his natural life.

This statute applies to works published at the time of passing the act, if they had not at that time been published more than twenty-eight years; for it was very soon after decided, that if they had been published more than that time, the author was not entitled to the copyright for life. *Brooke v. Clarke*, 1 B. & A. 396. But the statute does not require, as a condition precedent, that the work should be printed; and therefore, an author does not lose his copyright, by selling his work in manuscript before it is printed. *White v. Gerock*, 2 B. & A. 298.

(l) And it would seem that the words of a song, applied to an old tune, and published with it on a single sheet of paper, are privileged as a book under the statutes. *Hime v. Dale*, 2 Camp. 29. n.

The author of any additions or corrections of an old work, may acquire a property in such additions or corrections, the same as in an original work.

The inventor, designer, or engraver of prints, and engravings, has a similar property in such production, which was formerly limited to fourteen years (by 8 G. II. c. 13), but is now extended to twenty-eight years, by 7 G. III. c. 38., which gives the property of all prints and engravings for that term, to all, who either invent the design, or make, or print from another's design or picture; and enacts, that all those who, during the term, shall pirate or copy such prints, &c. shall forfeit the copies, to be destroyed, and five shillings for each copy: and the 17 G. III. c. 57. superadds an action at the suit of the proprietors for damages and double costs. (m) But in order to entitle the proprietor to the protection of these statutes, the name of such proprietor must be truly engraved on each plate, and printed on every print, and also the day on which it was published.² And a proprietor may sell and assign his property in a print, and invest his assignee with all his rights.³ It should be observed, that an *action for damages* may be maintained for pirating a print, though the proprietor's name is not inscribed on it, pursuant to 8 G. II. c. 13. § 1; as that statute only gives the penalty

¹ *Cary v. Longman*, 1 East, 558.

² *Sayer v. Dacey*, 5 Wils. 69.
Thompson v. Symonds, 5 T. R. 41.

³ *Ibid.*

(m) The selling a copy of a print with colourable variations, is within the construction of the word "copy," in the statute 17 Geo. III. c. 57, and an action on the statute, therefore, maintainable. *West v. Francis*, 5 B. & A. 787.

of five shillings, and forfeiture of the plate, for pirating prints; but the right to bring an action for damages is quite independent of the statute.¹ (n).

It will be seen, that in all the instances of qualified property which have been given in this section, the possession, either actual or constructive, has accompanied such qualified ownership.

It remains now to notice that species of property which the law calls a *chose in action*; that is, where the property and right of possession are in one man, and the actual possession in another. As, if A. buy of B. a horse, or a cow, and pay the price, but the horse or the cow be not delivered; or if B. bind himself in an obligation to pay A. one hundred pounds on a certain day, and make default in the payment, a property is thereby vested in A. in the sum secured: and in these cases, the horse, the cow, and the hundred pounds, are said to be *choses in action*, and can only be recovered by suit at law.

This right to a thing is considered by the civil law², and our own, as much the property of the person entitled thereto, as if actually reduced into possession, and hence it would appear, that such property might be assigned and transferred from hand to hand in the

¹ *Romworth v. Wilks*, 1 Camp. 94.

² Fl. lib. 41. tit. 1. 52.

(n) It would seem, that the first publisher of a book, obtained by breach of trust, may sue a stranger who pirates it; but that mistakes in the names of places, in a topographical work, which are retained in the subsequent publication by the defendant, will not be sufficient to support a count for pirating the plaintiff's work generally, although it might, perhaps, support a count for transcribing particular parts without the plaintiff's consent. *Carey v. Kearsley*, 4 Esp. 168.

same manner as property in possession: but, as it was thought to have a strong tendency to encourage litigiousness, and maintenance, to allow one man to sell his right of action to another, the old common law prohibited the assignment of a *chose in action*,¹ and therefore a contract, or right or cause to have an action for any duty or wrong, cannot be assigned, so as to entitle the assignee to sue at law in his own name.² The king is an exception to this rule, for he, by his prerogative, may either grant or receive a *chose in action*, for the law never could intend that the king would encourage maintenance or litigiousness; and in such case the king's grantee may sue in his own name without any special authority.³

But though the law in this particular still remains unaltered, the Courts, considering that in a commercial country, every facility should be afforded to the transfer of property, will so far notice an assignment of a *chose in action* as to permit an action to be brought by the assignee in the name of the assignor⁴; and though the assignor may have become a bankrupt after having made an assignment of a debt, and before the action brought, yet it has been held, that the debt so assigned passed the property to the assignee, and that the assignees under the commission had no title to it; the bankrupt standing at the time of the bankruptcy in the situation of a trustee for the person substantially interested; and that the plea of bankruptcy could not defeat an action brought in the name of the assignor, the whole facts of the case being replied to such plea.⁵

¹ Co. Lit. 214. a. 266 a.

² 2 Roll's Abr. 45. l. 40. 46. (G.)

³ *Strevell's case*, Dyer, 30. *Rex v. Twine*, Cro. Jac. 180.

⁴ *Delaney v. Stoddart*, 1 T. R. 26.

⁵ *Winch v. Keeley*, 1 T. R. 619.

And the Courts of Equity will protect an assignment of a chose in action, as much as a chose in possession.¹ (c)

¹ *Delvey v. Steadart*, 1 T.R. 25. *Lord Carteret v. Paschal*, 2 P. Wms. 129.

(c) To this must be excepted, bills of exchange, bills of lading, and promissory notes, which, though choses in action, are assignable by indorsement and delivery, the two former by the custom of merchants, and the latter by the statute of 3 & 4 Anne, c. 9.

SECT. II.

Of Sales where the Vendor hath no Property in the thing sold.

It must be confessed, that there is something anomalous in that class of sales of which it is now proposed to treat. That a man should be allowed to dispose of the property of another, and that such disposition should vest any property in the vendee, does certainly, in the abstract, appear inconsistent: yet when we consider the daily and hourly wants of individuals, which can only be supplied through the medium of sales, and the great inconvenience which would ensue, were it necessary for a purchaser in all cases, to investigate the title of his vendor, to every trifling article he may have occasion to buy, it must be admitted that it is better, upon the whole, to submit to the partial inconvenience of a fraudulent vendor, now

and then disposing of goods in which he has no property, to the injury of another's rights, than that a check should be given to that commercial intercourse between man and man, which can only be upheld by giving to a purchaser, under certain restrictions, a secure title to his purchase.

That a man may acquire by a wrongful act, a power of transferring to a third person the property of another, seems not to be peculiar to our laws, for we find it laid down in the Mosaic law, "If a man shall steal an ox, or a sheep, and kill it, or *sell it*; he shall restore five oxen for one ox, and four sheep for a sheep:"—thus considering the sale by the thief as ostensible owner, to divest the property of the true owner as much as the actual destruction of the thing stolen, inasmuch as in either case the restoration of it is rendered impossible.

Upon the same principle on which our law is founded, of securing an honest purchaser in the quiet possession of the thing conveyed to him, though illegally obtained by the vendor, was the Roman law of usucaption established — "*Bono publico usucapio introducta est, ne scilicet, quarundam rerum diu et ferè semper incerta dominia essent*;" by which a man who had *bona fide* bought, or received by gift, or otherwise, any thing of a person who appeared as the owner of it, though in fact he was not so, acquired, after the lapse of a certain time, (according to the nature of the property, and situation of the owner,) a perfect and undefeasible right to it.² So, also, by Plato's laws, property might be acquired or rather confirmed by usucaption.³

¹ Exodus, xxii. 1.

² *ff. lib. 41. tit. 3. 1.*

³ *Inst. lib. 2. tit. 6. l. 1. ff. lib. 41. tit. 3. Cod. lib. 7. tit. 31.*

⁴ *De Leg. 1. 12.*

By our law, however, the vendee's right does not depend on the lapse of time after the sale, but upon the manner of the sale itself, which is directed to be made with a degree of publicity, which gives the real owner an opportunity, if not of recovering his goods, at least of discovering the persons who may have stolen or wrongfully obtained them. Thus, it is laid down by Lord Coke as a general rule of law, that all sales and contracts of any thing vendible, in fairs, or markets overt (or open), shall not only be good between the parties; but also be binding on all those who have any right or property therein: which fairs and markets seem to have been anciently established for the purpose of facilitating the proof of contracts; for which purpose (says the *Mirroure*)², tolls were given, for that every private contract was forbidden, inasmuch that the sale of any thing above the value of twenty-pence, unless in open market, was prohibited; and every bargain was directed to be contracted in the presence³ of credible witnesses.³ And, by a law of William the Conqueror, it was ordered, that no one should buy either dead or live goods of the value of four-pence, without the testimony of four men, either of the borough or vill; and if the thing was challenged, and he had no such testimony, he should not be allowed to litigate the matter, but should restore the goods to the owner.⁴

By sale, then, in *market overt*, property may be transferred, though the vendor hath none at all in the goods sold; but this rule, as to sales in *market overt*, Lord Coke tells us, hath many exceptions.⁵

¹ 2 Inst. 713.

² Cap. 1. § 3. p. 14.

³ Ll. Ethel. 10, 12. Ll. Edg. Wilk. 80.

⁴ Ll. William the Conqueror, 45.

⁵ 2 Inst. 713. Doc. and Stud. dial. 2. c. 3, p. 121.

Thus, it shall not bind the King for any of his goods sold in the market overt.

Neither does it extend to sales in a covert place within a fair or market, as in a back-room or stam-house.

Or behind a hanging or cupboard, where a person passing before the shop cannot see.

Or where the windows of the shop are shut.

Nor to the sale of goods improper and foreign to the trade of the owner of the shop, as plate in a scrivener's shop, and *sic de similibus*.

Nor to sales by covin; as, where the buyer knows that the seller has no right, or that the seller is an infant, *feme covert*, &c.; unless the sale be of those things which the *feme covert* usually trades in, by the consent of her husband.⁶

Nor to sales between sun-setting and sun-rising, though such sales are binding between the parties.⁷

Neither does this rule of market overt extend to cases where the treaty for the sale was begun out of market.⁸

Nor to a gift in market overt.⁹

Nor to sales to a man of his own goods¹⁰; unless the property had been altered by a previous sale¹¹; or even though the property may have been altered, if the goods come again into the hands of the original vendor, for then the owner may stop them.¹²

¹ 2 Inst. 713.

² Ibid. Case of *Market overt*, 5 Rep. 836. Anon. Poph. 84.

³ Ibid. 2 Roll. Abr. Tit. *Market overt*, 50. p. 122.

⁴ Roll. Abr. *antè* *suprà*.

⁵ Roll. Abr. *antè*. Case of *Market overt*, *antè*. Anon. Poph. 84. Taylor v. Chambers, Cro. Jac. 69.

⁶ 2 Inst. 713. Doc. and Stnd. dial. 2. c. 47.

⁷ 2 Inst. 714.

⁸ Ibid. 713.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Perk. § 98.

¹² 2 Inst. 715.

Nor to pawns in market *overt*, for there can be no market overt for pawning¹; and, therefore, if goods be stolen and pawned, the owner may maintain trover against the pawnbroker.²

So, if a man pursue his *appeal* freshly, against a felon of his goods, till he be convicted, he shall have restitution of his goods, though they have been sold in market *overt*.³ But, by common law, the owner of the goods was only entitled to restitution when he prosecuted the party by appeal; but, if he neglected to appeal the felon, and he was afterwards convicted of the felony by indictment at the King's suit, he lost his goods for his neglect in not making fresh suit, and the policy of the law was to compel the party robbed to prosecute the felon. But now, by statute 21 H. VIII. c.11., it is enacted, "That if any do rob or take away the goods of any of the King's subjects within this realm, and be *indicted*, arraigned, and found guilty thereof, or otherwise attainted by reason of the evidence of the party so robbed, or owner of the said money, goods, and chattels, or any other by their procurement, that then the party so robbed, or owner, shall be restored to his money, goods, or chattels, and the justices before whom such person shall be attainted, or found guilty, by reason of the evidence of the party so robbed, or owner, or by any other by their procurement, have power to award writs of restitution for the said money, goods, or chattels, in like manner as though any such felon or felons, were attainted at the suit of the party in an appeal."

¹ *Harlop v. Hoare*, 2 Str. 1187.
² Wils. 8. 3 Atk. 44. S. C.

³ *Packer v. Gillies*, 2 Camp. 336. n.

⁴ 2 Inst. 714. 3 Inst. 242. *Foxley's*

case, 5 Rep. 110. Staunf. P. C. l. 3. c. 10. p. 165. ¹ Hale, Hist. P. C. c. 47. p. 539.

This act, Lord Hale¹ says, was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution; and it would be small encouragement, if a thief by sale in market overt, should elude it; and therefore (though it was formerly doubted), it is held for law at this day, that sale in market overt shall not be allowed against the writ of restitution upon this statute.² And although it may sometimes happen that this rule may be hard upon individuals, and that a man may lose that which he came by *bond fide*, in market overt, yet *spoliatus debet ante omnia restitui*; and the old rule *ocean emptor* holds here. And when two rights clash the ancient right is to be preferred.³

It is now usual for the Court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods as are brought into Court, or the party may peaceably retake his goods, wherever he happens to find them.⁴ Or, if the felon be convicted on the evidence of the owner of the goods, and afterwards have his clergy, or be pardoned, the owner may bring trover against him⁵, or against any one in whose possession the goods may be found after the conviction; but no action will lie against a man who may have purchased them *bond fide* in market overt, and sold them again before the conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession.⁶ (p.)

¹ 1 Hale, Hist. P. C. c. 47. p. 345.

² 2 Inst. 714. Kelynge, 48.

³ 2 Inst. 714.

⁴ 2 Roll's Abr. tit. Trespass, (1).

565-B. Higgins v. Ashurst, 2 Roll. Rep. 55. 1 Hale, Hist. P. C. 546.

⁵ Dawkes v. Cavenagh, Style, 346.

Markham v. Cobbe, Noy, 82.

⁶ Horwood v. Smith, 2 T. R. 750.

(p) But if a man buy his own goods in a fair or market, the contract of sale shall not oblige him to pay the price, unless the property

So that, where goods are feloniously stolen, a sale in market overt shall not bind the owner, if he prosecute the felon to conviction or outlawry; but in cases where such conviction becomes impossible, it is sufficient that he use his utmost endeavours; as, if he take the felon and imprison him, and he die before trial.¹

But, where no conviction takes place, or is avoided by such means, the owner of the goods is concluded by a sale in market *overt*.

And, as no property is gained in goods taken *piraticè*², if a pirate sell the goods so taken, out of market, the owner may retake them³: but if they are sold in market *overt* the property is bound⁴: and so of goods obtained by false pretences, for they are not protected by the statute.

And, if goods are obtained under false pretences, and afterward pawned, it seems, the pawnee is entitled to retain his lien against the true owner, though he prosecute the offender to conviction. Thus, in a case⁵ where it appeared that certain goods had been obtained from the defendant by false pretences, and afterwards pawned to the plaintiff for a valuable consideration, without notice of the fraud; that the person obtaining them had been convicted by the defendant, on which the latter

¹ 1 Hale's Hist. P. C. c. 47.

² Grot de J. et P. l. 3. c. 9. § 16.

³ Per Dodderidge, J. in *Res v. Marsh*, Bulst. 29.

⁴ *Spanish Ambassador v. Jolliff*, Hob. 79.

⁵ *Parker v. Patrick*, 5 T. R. 175.

has been altered by a previous sale; and, notwithstanding any number of intervening sales, if the original vendor who sold without having the property, come again into the possession of the goods, the original owner may take them when found in his hands. 2 Black. Com. 449.

got possession of the goods again; and the action was brought by the pawnbroker to recover them from the defendant; and a verdict having been found for the plaintiff, it was moved to enter a nonsuit. But the Court said, the case was distinguishable from the case of felony; for, there, by a positive statute, the owner, in case he prosecutes the offender to conviction, is entitled to restitution; but that does not extend to this case, where the goods were obtained from the defendant by fraud.

And a sale in *market overt* shall bind the owner of the goods; though such owner be an *infant, feme covert, non compos, in prison, or beyond sea*.¹

And shall alter the property, though no toll be paid.²

It may here be proper to state shortly what shall be considered as *market overt*, which in the country is usually held on some particular days in each week, which are either specified in the charter, or established by prescription, which supposes a charter, without which there can be no market.³ The usual place where a market is held is the market, and not every place within the town.⁴ The same may be said of fairs, for every fair is a market, but not *à contra*, and therefore, where any statute speaks of a market, a fair shall also be comprehended.⁵ But in London it is otherwise, for every day (except Sunday) is market-day⁶, and every shop in which goods are exposed to sale is *market overt*, for such things only in which the shopkeeper is in the habit of dealing; and this is by the custom of London, which was certified by Lord Coke when he was re-

¹ 2 Inst. 713.

² Ibid. 714. *Case of Market overt*, 5 Rep. 85.

³ 2 Inst. 220.

⁴ *Anon. Godb.* 131.

⁵ 2 Inst. 406. 221.

⁶ *Taylor v. Chambers*, Cro. Jac. 68. *Anon. Poph.* 84.

corder¹; and therefore will now be judicially noticed by the Courts.² But a *wharf* in London is not within the custom, and cannot be considered market *overt* for articles which are usually sold there.³ (q)

But as this law of market overt might be greatly abused, from the great facility which in London is afforded to a dishonest person to dispose of goods wrongfully obtained to pawnbrokers and others; it is enacted by statute 1 Jac. 1. c. 21., that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property.

Before we quit this subject, it will be proper to observe that there is one species of personal chattels in which the property is not easily altered by sale, even in market *overt*, without the consent of the owner, and that is horses: for, by statutes 2 & 3 Ph. & M. c. 7. and 31 Eliz. c. 12., no sale of any horse that has been stolen changes the property, unless it stand, or be ridden, an hour together, between ten o'clock in the morning and sun-set, in an open part of the market, to be set apart for that purpose, and all the parties to the bargain appear with the horse before the toll-gatherer, who must enter in a book the names and dwelling-places of such parties, properly attested, and the price, colour, and one mark, at least, of the horse. And if the owner, within six months after the horse is

¹ Case of *Market overt*, 5 Rep. 83.

² Doc. and Stud. dial. l. c. 10.
Blacquire v. Hawkins, Dougl. 380.

³ *Wilkinson v. King*, 2 Camp. 356.

(q) It has also been decided, that this custom only extends to the City of London, and that therefore the Strand is not market *overt* 12 Mod. 521.

stolen, put in his claim before some magistrate, where the horse shall be found; and within forty days more prove his property by the oath of two witnesses, and tender to the person in possession such price as he *bond fide* paid for him in market overt; he shall, notwithstanding the sale has been perfected as the act directs, have his horse again. But in case any of the directions of such act be not complied with, the sale is absolutely void; and the owner shall not lose his property, but may at any time retake his horse wherever he may happen to find him, or bring an action for him, at his election.

These statutes extend to horses taken by wrong, though not stolen.¹

And it has been decided, that if the seller of a stolen horse in market overt, be entered in the toll-book by a false name, the property is not altered²; though a contrary doctrine is held in *Wikes v. Morefoots*.³ But the former seems to be the better opinion; for the misnomer of the vendor in a great measure defeats the object of the statute, and tends to mislead the owner of a stolen horse in his search.

¹ 2 Inst. 717

² *Gibb's case*, Owen, 27. 1 Leon, 158. S. C.

³ Cro. Eliz. 86.

CHAPTER IV.

OF SALES, WITH RESPECT TO THE MANNER OF CONTRACTING.

IN the first chapter, we have seen the nature of sales in general, and the usual requisites to the completion of the contract. It will be the business of this chapter to point out the different modes of contracting sales, which are recognised by the law of England, in compliance with legislative enactments or universal usage. The contract of sale will accordingly be treated of under the following heads ; as contracted

1st. *By Deed.*

2d. *By Parol.*

3d. *Under the Directions of particular Statutes.*

4th. *Sales by Auction.*

 SECT. I.
Of Contracts of Sale by Deed.

The alienation of personal chattels by deed, though sometimes made, is by no means usual, except in particular cases ; as, where a man bargains and sells all his

goods and chattels; or, when the sheriff conveys goods seized under an execution, &c. ; in which cases, the property is transferred by an instrument called a bill of sale, in which the particular goods sold are usually specified, either in the body of the instrument, or in a schedule subjoined. And in such cases, where the immediate delivery of the thing sold is possible, such delivery is necessary to give a sure title to the buyer; for, although the sale as between the vendor and vendee is binding without such delivery, as the property of the goods passes by the delivery of the deed¹; yet, if the vendor continue in possession, as ostensible owner of the goods, and afterwards become bankrupt, they will be assigned by the commissioners under the commission, as being in the possession, order, and disposition of the bankrupt, within the statute 21 Jac. I. c. 19. § 11., which enacts, "That if any person shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietor, have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon themselves the sale, alteration, or disposition as owners; that in any such case, the commissioners, or the greater part of them, shall have power to sell and dispose of the same, to and for the benefit of the creditors which shall seek relief by the commission, as fully as any other part of the estate of the bankrupt." (r)

¹ Noy's Max. c. 42.

(r) This statute has been repealed by the recent consolidation bankrupt act, 6 Geo. IV. c. 16, which takes effect on the 1st day of September 1825; but the act contains a clause (s. 72.) which has enactments similar to the statute of James, and therefore the law upon this subject remains as before.

This statute was made to prevent traders from deceiving the world, by holding out a false appearance of wealth which they do not in fact possess, and by that means gaining credit.

It has been determined, that a mortgage of goods, and assignments of choses in action, are within the meaning of this statute, and fraudulent as against creditors, if the goods, &c. be not delivered.¹

It would be foreign to the purpose of this treatise, to enter into detail of all the cases which have been determined upon this statute; (s) it is sufficient for the present purpose, to observe, that whenever the vendor is suffered to keep possession of the goods under circumstances which give the reputation of ownership, the case is within the statute²; and consequently the sale is void

¹ *Ryall v. Rolle*, 1 Ves. 348. 1 Atk. 165. and 1 Wils. 260. S. C.

² *Per Eyre C. J. in Lingham v. Biggs*, 1 B. & P. 67.

(s) But it may be shortly remarked, that in some cases, although by a particular stipulation upon the sale of the property belonging to a trader, he may be allowed to continue in possession, yet if the transfer be generally known, he will not be considered the reputed owner within the meaning of the legislature. *Muller v. Moss*, 1 M. & S. 335. And that an usage of trade, which is generally known to persons dealing with a trader, may, under certain circumstances, take a sale out of the operation of the statute, and prevent goods which have been sold by a trader from passing to his assignees, although they have remained in his possession. *Horn v. Baker*, 9 East, 215.

But it has been shown in a former part of the work, that goods in the hands of a retail trader, upon the terms of sale or return, will pass under a commission of bankruptcy against such trader. *Gibson v. Bray*, Holt, 556. Although in one case, where the party only received the goods in the evening prior to his bankruptcy, and had in fact never unpacked them, the Court held, that there was no ground for saying that such goods passed to the assignees under the commission of bankruptcy. *Gibson v. Bray*, 1 Moore, 519.

as against creditors. Hence, the question in these cases must necessarily, as observed by Mr. Justice Buller in *Walker v. Burnell*¹, be rather a question of fact than of law : and therefore it is the province of the jury to say whether, under the circumstances, the bankrupt had the reputed ownership of the goods.

In the case of goods either sold or mortgaged, they ought to be delivered specifically, or the key of the warehouse where they are, &c., with the possession thereof; and the delivery of the muniments, books, and writings, relating to *choses in action*, and enabling the vendee or mortgagee to reduce the same into possession by suit or action, is tantamount to a specific delivery of goods; and if a bond be assigned, the bond must be delivered, and notice must be given to the debtor; but in an assignment of book-debts, notice alone is sufficient, because there can be no delivery.²

But should the vendor not become bankrupt, and the goods sold appropriated to the use of his creditors under the statute of Jac. I., still the sale, when the goods are suffered to remain in possession of the vendor, may be avoided under the statute 13 Eliz. c. 5., which is stated to be made “for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, — which feoffments, &c. had been and were devised and contrived of malice, fraud, covin, collusion, or guile, to the end, and purpose, and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and

¹ Doug. 317.

² *Byall v. Rolfe*, 1 Ves. 348. 1 Atk. 165. 1 Wils. 260. S. C.

reliefs, not only to the let and hinderance of the due course and execution of the law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without which no commonwealth or civil society can be maintained or continued."

It was therefore "declared, ordained, and enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, &c. that then was, or at time thereafter should be had or made, to or for any intent or purpose before declared and expressed, should be from thenceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, and fraudulent devices and practices aforesaid, were, or should, or might be in anywise disturbed, hindered, delayed or defrauded,) *to be clearly and utterly void*, frustrate, and of no effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

It will be seen, that there is a great difference between this statute and the before-mentioned statute of James, upon which the only question that can arise is the fact of the vendor's *possession as owner* (1); but by this statute, all sales made to defraud creditors are made void as against them; hence, the fraudulent intention is the principal question in cases on this statute;

(1) This observation applies to the new bankrupt act, 6 Geo. IV. c. 16.

and though the vendor's continuing in possession of the goods is itself a badge of fraud, there are many other *indicia* of fraud from which the intention of the parties may be inferred.

Under what circumstances sales have been deemed void, as against creditors, by the statute of Elizabeth, will be seen by the following cases.

The leading case on this statute is *Twyne's*¹, which was determined soon after the passing of the act, and came before the Star-Chamber, on an information filed by the Attorney-General against Twyne, for making and publishing a fraudulent gift of goods. The case appeared to be, that one Pierce was indebted to Twyne in four hundred pounds, and was also indebted to C. in two hundred pounds: C. brought an action of debt against Pierce, and, pending the writ, Pierce, being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels, real and personal, to Twyne, in satisfaction of his debt; notwithstanding which, Pierce continued in possession of the said goods, and some of them he sold, and shorn the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and issued a *fieri facias*, directed to the sheriff of Southampton, who would have taken the said goods in execution; but Twyne resisted the sheriff by force, and claimed the goods as his property by the said gift, declaring that it was made on a good and lawful consideration. The question was, whether on the whole matter this gift was fraudulent and void by the statute of Elizabeth or not? And it was resolved by the whole Court that it was. And in this case (says Lord Coke) divers points were resolved.

¹ 3 Rep. 80 A

1. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or any thing of necessity; for it is said, *quod dolosus versatur in generalibus*.

2. The donor continued in possession, and used the goods as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspecta*.

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his own proper goods; and a trust is a cover of fraud.

6. The deed contains, that the gift was made honestly, truly, and *bonâ fide*; *et clausula inconstitutæ semper inducant suspicionem*.

It was also resolved, that notwithstanding there was a debt due to Twyne, and a good consideration for the gift, yet it was not *bonâ fide*, for it was accompanied with a trust; and a good consideration does not suffice unless it be also *bonâ fide*.¹ (u)

¹ And see *Cadogan v. Kennott*, Cowp. 434.

(u) But a mere preference of a particular creditor, after the debtor has been sued by another, will not vitiate a bill of sale; for, if a man be indebted to two persons, and after having been sued to judgment and execution by one of them, go to the other, and voluntarily give him a warrant of attorney to confess judgment, upon which judgment is immediately entered, and execution levied, on the same day on which the other creditor would have been entitled to execution, and had threatened to sue it out; it has been decided, that the preference so given by the debtor is not unlawful, nor fraudulent within the meaning of the statute, 13 Eliz. c. 5. *Holbird v. Anderson*, 5 T. R. 235. And in another case, where a debtor who

The following case¹ came before the Court of King's Bench on a motion for a new trial, from the northern circuit, and was in substance as follows:—It was an action brought by the sheriff of Lancashire against the defendants, who had seized the goods in question, which formerly belonged to one Hayes, after they had been taken in execution at the suit of a creditor, in April, 1787, to whom the sheriff had paid the value. The defendants set up two answers, the first of which it is only material to mention here; which was, an assignment dated the 16th of August, 1786, by Hayes, to two persons, for the benefit of such of his creditors as would sign a deed of compromise by a certain time, notice whereof had been published in the county papers. The answer given by the plaintiff to this was, that it was agreed that Hayes should continue in possession till May, 1787, he accounting for the profits in the meantime to the trustees; and he accordingly continued in visible possession of the goods after the assignment; and therefore the transfer was void by stat. 13 Eliz. To this the defendants replied, by showing an undertaking by Hayes to account to the trustees for all the profits of the trade from the date of the assignment. The plaintiff contended, that neither that undertaking,

¹ *Banford v. Baron*, 2 T.R. 594: n.

was insolvent being sued by a creditor, whilst the suit was pending but before execution, executed an assignment of all his effects to trustees for the benefit of *all his creditors*, and possession was immediately taken under such assignment; it was held, that the assignment was not fraudulent within the meaning of the statute, although made with intent to delay the plaintiff in his execution. *Pickstock v. Lyster*, 3 M. & S. 571.

nor the notice in the papers, was sufficient to show the change of property, and therefore the transfer was void by the assignor's continuing in possession. After hearing the case argued, the Court thought it right to take the opinion of all the Judges upon it, who were unanimously of opinion "that unless possession *accompanies and follows* the deed, it is fraudulent and void." ¹ (v)

The case was followed by that of *Edwards v. Harben*, executor of Mercer ² (w), where the case was, that William Tempest Mercer, in his lifetime, and before the execution of the bill of sale hereinafter mentioned, was indebted to the plaintiff in the sum of twenty-two pounds eighteen shillings and sixpence, for goods sold and delivered, which sum remained due to the plaintiff at the time of the action brought. Mercer, at the time of the execution of the bill of sale, was likewise in-

¹ Per Buller J. 2 T. R. 595.

² 2 T. R. 587.

(v) And in another case, which was an action of trover brought by the assignees of a bankrupt, where the defendants were bankers and large creditors of the bankrupt, who had bought goods on credit from several tradesmen; the defendants employed an agent to buy part of these goods from the bankrupt previous to his bankruptcy, which he did, and gave in payment his notes payable at a future day. These notes were paid in to the defendants, and the agent sold the goods for their use, and accounted with them as their agent. This was held to be a scheme concerted between the defendants and the bankrupt to keep up his credit, and to enable him to get goods which were to be employed in discharging the debt due to the defendants, and that consequently the sale was void as a fraudulent transaction. *Martin v. Peatris*, 4 Burr. 2477.

(w) In a late case, Lord Chief Justice Dallas stated, that the case of *Edward v. Harben* had been often dissented from; and Mr. Justice Park said, that doubts had arisen with respect to the extent of the doctrine there laid down. *Steward v. Lampe*, 1 B. & B. 511.

debted to the defendant in the sum of one hundred and ninety pounds, for money lent. On the 27th of March, 1786, Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the debt. The defendant refused to accept the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid, to which Mercer agreed; and accordingly, on the same day, executed a bill of sale in the common form, by which he bargained and sold to the defendant, for ever, his household furniture, medicines, stock in trade (particularly specifying them), and *all and every the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes.* Immediately upon the execution of the bill of sale, possession was delivered to the defendant, in the manner therein described, viz. by delivery of one corkscrew, in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale remained in the possession of Mercer until the time of his death, which happened on the 7th of April, 1786. On the 8th of April, 1786, being before the expiration of the fourteen days from the execution of the bill of sale, the defendant entered, and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for two hundred and thirty-six pounds seven shillings and five-pence. Mercer died intestate, and no letters of administration were taken out by the defendant, or by any other person, before the commencement of the action. The question for the opinion of the Court was, whether the defendant was entitled to re-

tain the produce of the said effects, or, at least, the value of one hundred and ninety-one pounds, the consideration of the bill of sale; or whether the bill of sale was void as against the creditors of Mereer, and the plaintiff entitled to recover his debt of twenty-two pounds eighteen shillings and sixpence against the defendant, as executor *de son tort*?

On the part of the plaintiff, it was contended, that the bill of sale was fraudulent against the creditors of the deceased, and void under 13 Eliz. c. 5., and that, consequently, the defendant must be considered as an executor *de son tort*, and *Twyne's case*, *Stone v. Grubham*¹, and *Ryall v. Rolle*², were referred to.

For the defendant it was urged, that the property of the goods passed immediately to the vendee, the bill of sale being delivered to the vendee himself; and that, though it was agreed that he should not take possession for fourteen days, yet that condition could not effect the immediate property which passed by the deed itself, *Co. Lit.* 36, a.; but that, at all events, the defendant claiming a right to the goods could not be considered as executor *de son tort*.

Buller J. said, that the first point had been decided in *Bamford v. Baron*, and observed, that this had been argued by the defendant's counsel, as being a case in which the want of possession was only evidence of fraud; and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; and he said, "that this is the point we have considered, and we are all of opinion *that if there be nothing but the*

¹ 2 Bulst. 216.

² 1 Ves. 348. 1 Atk. 165. 1 Wils. 260. S. C.

absolute conveyance, without the possession, that, in point of law, is fraudulent." — Judgment for the plaintiff. (x).

Trespass against the defendants, sheriffs of London¹, for taking certain goods under an execution.

The goods had been the property of a Mrs. Spencer, who then kept a public-house : the plaintiffs had been her distillers, and claimed under a bill of sale from her.

The defendants had seized under an execution, at the suit of another creditor, of the name of Bayley.

On the 4th of April, Mrs. Spencer had given the bill of sale to the plaintiffs ; and a person on their account had entered at seven o'clock in the evening of that day, and taken possession. The bill of sale was of all her effects, including all the liquors in the house, as well as the furniture, &c.

The execution was sent into the house the next day, at the suit of Bayley.

The defence was, that the bill of sale was merely colourable ; and it appeared in evidence, that the person in possession under the bill of sale, had permitted Mrs. Spencer to sell the liquors, in the usual way of her trade, on the evening of the 4th of April, and to receive the money during that time ; and that she had not accounted for it.

The sheriffs had notice of the bill of sale, when the goods were taken by them under the *fa. fa.*

Under these circumstances Lord Kenyon said, that allowing Mrs. Spencer to appear, as usual, mistress of

¹ *Paget v. Perchard*, 1 Esp. 205.

(x) A conveyance of chattels unaccompanied with possession, is void ; although in the same instrument there may be a valid mortgage of leasehold buildings, in which the chattels are situated. *Reid v. Blades*, 5 Taunt. 212.

the house, and to execute acts of ownership, after having parted with all her property by the bill of sale, was inconsistent with such situation, and a sufficient evidence of fraud, as against *bond fide* executions : and he therefore directed a nonsuit.

So, when a man took out execution against another, and by agreement between them, the owner was to keep possession of the goods upon certain terms ; and afterwards, another obtained judgment against the same man, and took the goods in execution ; it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor ; because there was no change of possession, and so no alteration made of the property : and Sir E. Northey, who cited this case, said, it had been ruled forty times in his experience, at Guildhall, that if a man sell goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held.¹

But, notwithstanding the general principle laid down in the foregoing authorities, there are cases, where, though possession be not delivered *at the time* of the conveyance, it shall not be deemed fraudulent. Thus, if a bill of sale be made, to take effect at some future time, or upon condition, and so expressed therein, the sale is not void, though possession be not delivered immediately ; for the vendor's continuing in possession until such future time, or until the condition be performed, is consistent with the deed ; and such possession comes within the meaning of the rule laid down in *Bamford v. Baron*, as accompanying and following the deed.²

¹ Per Sir E. Northey in *Bucknal v. Ben*, 2 T.R. 596., and see *Stone v. Roiston*, Pr. in Ch. 287. Grubham, 2 Bulst. 218.

² Per Buller J. in *Edwards v. Har-*

So, where one Brewer¹, having shipped a cargo of goods, borrowed of the plaintiffs six hundred pounds, on bottomry; and, at the same time, made a bill of sale of the goods, and the produce and advantage thereof to the plaintiffs: the Lord Chancellor held, that the trust of the goods appeared upon the very face of the bill of sale; and that, though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them to their advantage, and that Brewer's keeping possession of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale: and therefore, the possession of Brewer was consistent with the deed, and not void by the statute.

The following case, also, is directly in point. It was an action of trover,² brought by the plaintiffs, who were trustees under the marriage-settlement of Lord Montfort, against Mr. Kennett, who was a judgment creditor of Lord Montfort's, and the other defendants, who were sheriffs'-officers, to recover certain goods taken by them in execution under a *fieri facias*. The case appeared to be, that Lord Montfort, being considerably in debt, by settlement made before marriage, in consideration of the marriage, and of ten thousand pounds, his wife's fortune, which was supposed to be more than the amount of his debts at that time, had conveyed all his real estate, and likewise all his household furniture (his real estate, alone, not being thought an adequate settlement), in trust for himself for life, remainder to his wife for life, remainder to his first and other sons, in strict settlement. The lady being a ward of Chancery, the settlement was approved of by the master, and the goods enumerated in a schedule.—Lord Montfort, after the

¹ *Bucknal v. Roiston*, Prec. in Chan. 287.

² *Cadogan v. Kennett*, Cowp. 432.

marriage, continued in possession of the goods; after which the defendant, who was a creditor of Lord Montfort's at the time of the settlement, took them in execution.

At the trial, Lord Mansfield inclined to think, that the settlement being made under a treaty with the Court of Chancery, and approved of by the master, was a *bonâ fide* transaction, and that the possession of Lord Montfort was *not fraudulent*, because it was *in pursuance* and execution of a *trust*.

The jury accordingly found a verdict for the plaintiff; and upon a motion for a new trial, Lord Mansfield, after stating the question, said, "he had thought much of this case since the trial, and in every light in which he had considered it, he had not been able to raise a doubt;" and he said, the statute does not militate against any transaction *bonâ fide*, where there is no imagination of fraud; but if the transaction be not *bonâ fide*, the circumstance of its being done for a valuable consideration, will not *alone* take it out of the statute: that he had known several cases, where persons have given a fair and full price for goods, and where the *possession was actually changed*; yet, being done for the purpose of defeating creditors, the transactions have been held fraudulent, and therefore void: that there was no suggestion of any intention to defraud, or the most distant view of disappointing any creditor, for the Master in Chancery and the Great Seal could have no fraudulent view: and as to the argument drawn from the possession, it was a *part of the trust* that the goods should continue in the house.—The rest of the Court concurring in what had fallen from the Chief Justice, the rule was discharged.

* And see *Poley v. Barnell, Cowp.* 5 T. R. and *Hastington v. Gull*, *ibid.* 432. (in note) *Jarman v. Woolleton*, 680.

So, ' where a deed of trust conveyed the lease of a farm, and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum, to be paid to him by one of the trustees, in trust to dispose of all the property ; and out of the produce, to reimburse the trustee the sum advanced by him to the grantor, and all other the trustee's demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper ; the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was), as a separate maintenance for her, she being obliged to separate from him, on account of ill usage : it was held that this deed was not fraudulent or void, as against creditors, it appearing to have been made *bond fide* at the time ; and that all the creditors of the grantor known at the time, had, upon application to the trustees, received payment of their debts. (y)

' *Nunn v. Wilmore*, 8 T. R. 521.

(y) And where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods, and notice of such assignment was advertised in the newspapers, and the goods were afterwards sold by the trustees by public auction, and the plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some but left the greater part in her possession ; it was held, that such purchase by the plaintiff would protect the goods against a judgment afterwards obtained, and execution levied by a creditor of the husband, who had notice of the assignment at the time, although the plaintiff permitted his mother to continue in possession ; and that therefore he was entitled to recover from the sheriff. *Leonard v. Baker*, 1 M. & S. 251.

And in another case, where the plaintiff had purchased a public-house, for which he could not himself obtain a licence, because he

Thus much of sales made by the owner himself; under which we have seen, it is not *in all cases* necessary, that the vendee should take immediate possession; *à fortiori*, where the party *bonâ fide* takes a bill of sale from a sheriff, under an execution for a just debt.

Thus, where¹ the goods of A. being taken in execution, and put up to sale, B. became the purchaser, and took a bill of sale from the sheriff, *but permitted A. to continue in possession*. A. then executed another bill of sale of the same goods to C., a creditor, under which the latter took possession of the goods, and sold them, notwithstanding B. gave him notice of his prior title; whereupon B. brought an action against C. for the produce of such sale, as money had and received to his use: it was held that the first sale was valid, though A. continued in possession; and Lord Eldon C. J. said, If the plaintiff had lent money to A. to buy these goods, and then taken a conveyance of them as a security for his debt, thus arising out of the mere act of lending the money, leaving A. in possession of the goods, it would not have been a fraudulent act; and he cited *Buller's Nisi Prius*, p. 258; and this appeared a stronger case, by the public buying from the sheriff; and the transaction being found by the jury (to whom that point was particularly left) to be *bonâ fide*, a rule *nisi*, for setting aside

¹ *Kidd v. Rawlinson*, 2 B. & P. 59. 3 Esp. 62. S. C.

resided in another tavern, and had put B., who was an insolvent person, into the house as his servant, to keep it for him, and had supplied him with money to pay for the licence, which was granted to B.; it was held, that the sheriff was not entitled, under an execution against B., to take the plaintiff's liquors and chattels in the house committed to the custody of B. *Dawson v. Wood*, 3 Taunt. 256.

the verdict which had been found for the plaintiff, was refused. (z)

Thus, not taking possession, though it is in some measure indicative of fraud, is not conclusive; but to make a sale absolutely void, there must be something to show the deed fraudulent in the concoction of it. It is incumbent on the person claiming title to show that the transaction is *bona fide*.¹

In addition to these decisions, it may be well here to add Lord Coke's advice to purchasers² from a person indebted to others at the time of the conveyance.

1. "Let it (the sale) be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud."

2. "Let the goods and chattels be appraised by good people, to the very value, and take a *gift in particular* in satisfaction of your debt."

¹ Per Lord Ellenborough in *Hoffman v. Pitt*, 5 Esp. 25.

² In *Twyne's case*, 3 Rep. 81. a.

(z) A creditor who has taken in execution the goods of a defendant who had confessed judgment, and has herself bought them by public auction, and taken a bill of sale from the sheriff, for a valuable consideration, and let them to the former owner for a rent which has been actually paid, has a title which cannot be impugned as fraudulent by other creditors having executions against the same defendant. *Watkins v. Birch*, 4 Taunt. 823. And in another case, where a party had mortgaged land with a windmill upon it, which was not a fixture, and was bargained and sold in the mortgage, in which it was described as being situated upon the land; the Court held, that the windmill could not be taken in execution by a creditor of the mortgagor, although it remained in his possession as usual. *Steward v. Lombard*, 1 B. & B. 506.

Generally, a bill of sale of goods made for a valuable consideration, though unaccompanied with possession, is valid as against the vendor, and also as against a creditor with whose knowledge or assent it was given. *Steel v. Brown*, 1 Taunt. 381.

3. "Immediately after the gift, take the possession of them; for continuance of the possession in the donor is a sign of trust." (a)

(a) So abhorrent is the law of every species of fraud, that wherever a sale is effected by fraudulent inducement it is void. Thus, in a case where the agent to the vendor of a picture, who, knowing that the vendee erroneously believed it to be the property of a particular person for whom the agent was at that time employed in selling a number of pictures, and that such belief influenced the vendee's judgment, permitted him to make the purchase without removing the delusion; Lord Ellenborough held, at *Nisi Prius*, that the sale was fraudulent and void. *Hill v. Gray*, 1 Stark. 434.

And in an old case, where a man had agreed to buy a horse, and give a barley corn for the first nail, and double it for every nail in the horse's shoes, and an action was brought for the price of the horse; Hyde J. held that the bargain was void, and directed the jury to give the plaintiff the mere value of the horse as damages. *James v. Morgan*, 1 Lev. 111.

SECT. II.

Of the Contract of Sale by Parol.

By the law of England, all contracts not under seal are considered as parol contracts, though reduced into writing and signed by the contracting parties; and, in truth, such contracts in their nature seem to be more evidences of a previous contract than the contract itself. Thus we find them generally expressed in the past tense; as in the common sale-note, the words "bought and sold" are always used: and being therefore considered as memorandums of the terms of a contract previously entered into by parol, they are construed according to

the apparent intention of the parties, to be collected from such memorandum, with reference to the circumstances under which the contract was entered into. Thus the words "bought and sold," in a sale-note, have been construed to mean "agreed to buy and to sell," where, from the nature of the contract, such appeared to have been the intention of the parties.¹

As the contract of sale by deed is seldom resorted to in commercial transactions (except under particular circumstances), it is by means of parol contracts, that the daily changes of property in the mercantile world are effected; which are either perfected by immediate payment and delivery, or (as is more frequent in sales to a large amount), reduced into writing by the auctioneer or broker with whom such contract is made, as we have had occasion to observe, when speaking of the Statute of Frauds in the first chapter.

There is also another mode of transferring property which has not been noticed; by indorsement of a bill of lading. As by far the greater part of the property in the commercial world depends upon such transfers, it is material to form a just idea of the principles upon which they stand. Let us see the nature of this document. It is an acknowledgment under the hand of a captain of a ship, on board of which goods are loaded, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable by the custom of merchants, and by indorsement and delivery the property is vested in the assignee.²

We have seen, when on the subject of delivery, that the bill of lading is the evidence of ownership in the goods; for the property vests as completely in the con-

¹ *Boyd v. Siffkin*, 2 Camp. 328.

² *Lickbarrow v. Mason*, 5 T. R. 68. 5 T. R. 686., and the argument of Mr. Justice Buller, 6 East, 21. n.

signee in a bill of lading by the shipment of the goods and delivery of such bill of lading, as by the delivery of the goods, though the goods be at sea in their transit.¹ And therefore, if A. order goods of correspondents abroad, which are accordingly shipped and consigned to him, the property of the goods is immediately vested in A.² So, if a correspondent abroad take bills of lading for the goods, by which they are made deliverable to his own order, and transmit them to A. without indorsement, the property of the goods vests in A. notwithstanding, if the shipment appear to have been made on his own account and risk.³ So, also, if the bill of lading be indorsed by the shipper in blank, the person to whom the same is transmitted may, by the usage of merchants, fill up such blank with words, ordering the delivery of the goods or contents of such bill of lading, to be made to himself⁴; but that is only where the goods are shipped on account of the consignee, or he has a beneficial interest in them for a valuable consideration. But the mere indorsement of a bill of lading, without consideration, to an agent, to enable him to receive the goods on account of his principal, or to stop them *in transitu*, vests no property in such naked consignee; and Lord Ellenborough, in *Waring v. Cox*, said, that no case has gone so far as to decide that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods, *prima facie*, passes the property in them to the indorsee; and he added, that much confusion had arisen from similitudinary reasoning upon this subject; and that there

¹ *Wiseman v. Vandepuut*, 2 Vern. 203. *Edms v. Martlett*, 1 Ed. Raym. 271. 13 Mod. 156. 3 Salk. 290. S. C. *Godfrey v. Furzo*, 3 P. Wms. 186., and *Brown v. Heathcote*, 1 Atk. 160.

² *Walley v. Montgomery*, 5 East, 586.

³ *Cox v. Harden*, 4 East, 211.

⁴ *Lickbarrow v. Mason*, 2 T. R. 63. and 5 T. R. 686.

must be value upon the indorsement of a bill of lading, or no property in the goods is thereby transferred; so that an assignee, without consideration, can maintain no action for the goods.¹ (b)

But, where the goods are shipped on the account and risk of the consignee, we have seen, that by the delivery of the goods to the captain, and the bill of lading and invoice to the consignee, the property is vested in the latter; subject, however, to be divested by the consignor's right to stop the goods *in transitu*, upon the insolvency of the consignee; and the property so vested in the consignee may be transferred by him to a third person, by indorsement and delivery of the bill of lading, during the transit of the goods.²

As the subject of transfer of property by indorsement of a bill of lading, is so intimately connected with the right of the consignor to stop *in transitu*, that it is impossible to speak of the one without incidentally touching upon the other, it will be most convenient to treat of that important branch of commercial law in this place.

Nothing can be more just and reasonable than that where a man who has consigned his goods to his correspondent upon credit, and, before such goods are actually delivered, hears that the consignee has become insolvent,

¹ *Waring v. Cox*, 1 Camp. 369. and see *Caso v. Harden*, 4 East, 211.

² *Lickbarrow v. Mason*, 2 T. R. 70. and Mr. Justice Buller's argument in that case, 6 East, 29. n.

(b) A bill of lading given before the goods are put on board, is fraudulent, and the indorsement of it will convey no property in the goods, even to a *bond fide* indorsee. *Osey v. Gardner*, Holt, 405.

And letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment, are not equivalent in effect to bills of lading indorsed. *Nichols v. Clement*, 3 Price, 547.

he should be at liberty to resume the possession of his goods, and thus save himself from the loss which he would otherwise sustain. Upon this principle, the Courts of Equity¹, and subsequently the Courts of Law, allowed the practice of stopping the goods in their transit to the place of destination, upon the insolvency of the consignee; a practice in which we may trace something of the spirit of the Roman law², (which in no case vested the indefeasible property in the vendee, till the payment of the price,) tempered, however, by that leaning which the law of England always has, to afford every facility consistent with justice, to the transfer of property, which is the life of all commerce.

It will be recollected that the delivery of goods upon a contract of sale, either in the actual or constructive possession of the vendee, vests the property in him, and leaves the seller to his action to recover the price. Hence it would seem, that, having once parted with the property, he would have no further controul over it; but it is to be observed, that the right of stopping *in transitu* does not depend upon a supposition that the property has not passed from the consignor, but, on the contrary, it is founded on an admission that the property has become vested in some other person. No question can ever be made upon the right of a man to seize his own goods; but the question in cases of stoppage *in transitu* generally is, whether, under the circumstances, the consignor may divest the property which has passed to another, and revest it again in himself.³ The right of the vendor to stop goods *in transitu*, in case of the

¹ *Snee v. Prescott*, 1 Atk. 245, and cited by Mr. Justice Buller in 6 East 25. n.

² *FF. l. 18. tit. 1. l. 53. and l. 14. tit. 4. l. 5. § 18.*

³ *Abbott on Merch. Shipp. 357. and Mr. Justice Buller's opinion in Lickbarrow v. Mason, 6 East, 27, 28.*

insolvency of the vendee, is a kind of *equitable lien*, adopted by the law, for the purpose of substantial justice, and does not at all proceed on the ground of rescinding the contract¹; for although goods are stopped *in transitu*, if the vendor afterwards offer to deliver them, he may recover the price in an action for goods bargained and sold; which he could not do, if, by the stopping *in transitu*, the contract was rescinded.²

But this principle of stoppage *in transitu* will, perhaps, be best exemplified by the following case:

One Burghall³, at London, gave an order to Bromley, at Liverpool, to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship of which the defendant was master, who signed a bill of lading, to deliver it in good condition, &c. to Burghall, in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered, on behalf of Bromley, not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses, that no particular ship was mentioned whereby the cheese should be sent; in which case, the shipper was to be at the peril of the seas. The action was brought upon the custom of the realm against the defendant as a common carrier. Upon this case Lord Mansfield, ruled that the plaintiff could not recover, and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price has been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the con-

¹ Per Lord Kenyon in *Hodgson v. Lay*, 7 T. R. 445.

² *Keymer v. Suwercropp*, 1 Camp. 109.

³ *Assignees of Burghall v. Howard*, 1 H. Black. 366. n.

signee, or his assignees under a commission of bankrupt; and that this was ruled not upon the principles of equity alone, *but the laws of property*; and the plaintiff was nonsuited.

By whom, and under what circumstances, this right can be exercised, will be seen by the following decisions, which naturally resolve themselves into this fourfold division: 1st. In what cases goods shall be said to be *in transitu*. 2d. When the *transitus* shall be considered at an end. 3d. By whom, and under what circumstances, this right may be exercised; and, 4th. In what cases the right is defeated during the transit.

According to this arrangement, let us now see in what cases goods shall be said to be *in transitu*.

It is a general rule, that the *transitus* in goods continues in all cases until there has been an *actual* delivery to the vendee; for although there are many cases, where, as between the vendor and vendee, if no bankruptcy happen, the goods are considered in the possession of the buyer by the delivery to a third person, as a carrier, &c.; which, though a delivery to any other purpose, is not such a delivery as will divest the vendor's right to stop *in transitu*, for such right can only be defeated by an *actual* delivery to the vendee; and therefore, goods remain liable to this right of the vendor, not only while they continue in the possession of the carrier, by land or by water, but also in any place connected with the transmission of them to the vendee. (c) Thus,

¹ *Stokes v. La Riviere*, cited by *lis*, 3 East, 397. and in *Ellis v. Hunt*, Mr. J. Lawrence in *Bohlingk v. Ing-* 3 T.R. 466.

(c) And the goods are *in transitu*, until there has been a complete delivery by the carrier, and such as would divest him of his

the plaintiff being a ribbon weaver, Messrs. Duhem, of Lisle, who had just arrived in London, applied to him for a quantity of ribbons. The plaintiff having received a favourable account of their circumstances from the defendants, packed up goods to a large amount, and delivered them to the defendants, to be forwarded to Lisle. These goods, with others purchased in like manner of other tradesmen, were forwarded, on or about the 12th of May to Messrs. Bine and Overman, the defendants' correspondents at Ostend, with directions to send them to the order of Messrs. Duhem. On the receipt of the goods, Bine and Overman wrote to Duhems an acknowledgment, and that they waited their directions. On the 12th of June the Duhems stopped payment; and not having fulfilled their engagements with the defendants, and being considerably indebted to them, the defendants, by letter of the 31st of May, countermanded the orders they had given to Bine and Co. as to the delivery of the goods, and directed them to alter the marks, and to deliver them to their order, which was accordingly done; and they were afterwards disposed of in satisfaction of the defendants' demand. They contending, that, immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhem, and that they, the defendants, had a right to

lien for carriage or freight. Thus, where a part only of a cargo had been taken out, and placed on the wharf of the consignee, but before it had been weighed for the purpose of ascertaining the freight, or any assent had been given to the consignee's taking possession of it, it was re-shipped by the carrier; it was held, that the special property remained in the carrier, and therefore, that the vendor was not deprived of his right of stoppage *in transitu*. *Crawshay v. Eades*, 1 B. & C. 181.

retain them. Lord Mansfield, before whom the cause was tried, said, That the goods were ordered to be delivered to the defendants *to be shipped* to Duhems, who became insolvent after the goods were sent to a factor at Ostend, and that the defendants having got them back, stood as they originally did. "No point is more clear, than if the goods are sold, and the price not paid, the seller may stop them *in transitu*: — I mean," said his Lordship, "*in every sort of passage to the hands of the buyers*. There have been a hundred cases of this sort: ships in harbour, carriers, bills, have been stopped; in short, where the goods are *in transitu*, the seller has that proprietary lien. *The goods are in the hands of the defendants to be conveyed*: the owner may get them back again."

The case of *Hunter v. Beal*¹ is to the same effect. That was an action of trover for a bale of cloth which was sent by Messrs. Steers and Co. of Wakefield to the defendant, who was an innkeeper, directed to Blanchard and Lewis, to whom the defendant's book-keeper gave notice that a bale was arrived for them; and Steers and Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers and Co. Blanchard and Lewis gave orders to the defendant's book-keeper to send the bale down to Galley Quay, in order to ship it on board the Union, to be carried to Boston. The defendant accordingly sent the bale to the quay; but it arriving too late to be shipped was sent back to him. Within ten days afterwards a clerk of Messrs. Blanchard and Lewis went to the defendant's warehouse, when the defendant asked

¹ Cited in *Bills v. Hunt*, 5 T. R. 466.

him what was to be done with the bale in question, and was ordered to keep it in his custody till another ship sailed, which would happen in a few days. Soon after this Blanchard and Co. became bankrupts, and Steers and Co. sent word to the defendant not to let the bale out of his hands; accordingly, when the bankrupts applied for it, he refused to deliver it up. Lord Mansfield was clearly of opinion, that though the goods might be legally delivered to the vendees for many purposes, yet, as to this purpose, there must be an absolute and actual possession by the vendee; and that delivery to a third person, to convey to them, is not sufficient to divest the vendor's right to stop *in transitu*.

So, also, if goods consigned to the vendee are delivered to a wharfinger on his account, to be forwarded to him, they are liable to be stopped in the hands of the wharfinger on the insolvency of the vendee, as the following case will show:

This¹ was an action of trover for one cask of madder and one chest of indigo. The case appeared to be, that one Josias Gard, a trader of North Tawton, in the county of Devon, about twenty-five miles from Exeter, on the 4th of July, 1799, by letter to the plaintiffs, who were dry-salters in London, ordered the goods in question to be sent to him. The plaintiffs accordingly, on the 6th of July, 1799, sent the goods by the ship *Lively*, consigned to Gard, and sent a letter of advice to him, inclosing the invoice, dated the 6th of July, 1799; which letter Gard received in course, and the goods, on their arrival at Exeter, were delivered to the defendant, who was a wharfinger there, and who received them on Gard's account, and paid the freight and charges, with which

he debited Gard, whom he considered liable for any loss which might happen to the goods. Whilst the goods so remained in the wharfinger's hands, Gard becoming embarrassed in his circumstances, on the 16th of September, 1799, wrote to the plaintiffs, acquainting them with his difficulties, and offering them to take back the goods, if they thought proper; in consequence of which the plaintiffs wrote to their agent at Exeter to stop the goods in the possession of the defendant; and, on the 20th of September, the plaintiffs' agent went to the defendant, and tendered him the freight and charges, and demanded the goods on behalf of the plaintiffs; but the defendant refused to deliver them as they had been demanded by some of Gard's creditors, he having stopped payment; but he promised not to deliver them out of his custody till he was certain of being safe in so doing. The plaintiffs' agent subsequently demanded the goods, and offered to indemnify the defendant, but he refused to deliver them; after which, on the 23d of September, a commission of bankrupt issued against Gard, and on the 3d of November the defendant delivered the goods to the assignees under the commission.

It was held, that the wharfinger, not having been employed by the vendee, was to be considered as a middle man, and that while the goods were in his hands they might be stopped *in transitu*, and that the notice to the wharfinger was a sufficient exercise of that right; and the wharfinger having, after such notice, and *contrary to his undertaking*, delivered the goods to the creditors of the consignee, was liable to be sued in trover.

And the same right continues in the vendor though the delivery be to a wharfinger named by the vendee.¹

¹ *Smith v. Gos*, 1 Camp. 282. and *Ellis v. Hunt*, 5 T.R. 402. and *Mudge v. Loe*, 7 T.R. 440. see the opinion of Mr. J. Buller in

So, where goods are sent to a packer named by the buyer, the packer is considered as a middle man between the vendor and vendee; and, therefore, goods in his hands may be stopped *in transitu* on the insolvency of the vendee.¹

Delivery of goods on board a ship *wholly chartered by the consignee*, is not such a delivery to the vendee as to put an end to the *transitus*. (d) Thus, where one Crane, a merchant in London, entered into an agreement with Usherwood, the master of a ship², for that ship going to Petersburg, and there receiving from Crane's factor a quantity of merchandize of various descriptions, and proceeding from thence to London, in consideration of certain freight to be paid *per ton*, half on the unloading, and the remainder in three months; for which goods the master was to sign the usual bills of lading, and Crane was fully to load the ship. In consequence of this agreement, the ship sailed to Petersburg, and was loaded by Bohtlingk and Co. on account and risk of Crane; and one bill of lading, directing the goods to be delivered to Crane or his assigns, was sent to him; the other, in consequence of the plaintiff, Bohtlingk, having information of Crane's insolvency, was afterwards sent to Schneider, his agent, with directions not to deliver that part to Crane, unless he gave sufficient security for the amount of the goods; and the

¹ *Hunt v. Ward*, cited in 3 T.R. 467.

² *Bohtlingk v. Inglis*, 3 East, 380.

(d) But where the vessel is chartered by the consignees for a term of years, who during that time have the entire disposition and controul over her, a delivery on board of the ship, is a delivery to the consignees. *Fowler v. M^r Taggart*, cited in 3 East, 386.

plaintiffs, at the same time that they sent this part of the bill of lading to Schneider, informed Crane of their having done so, and required him, in case he did not give the security, to deliver to Schneider the bill of lading that had been sent to himself.

In fact, Crane had become a bankrupt before the goods were delivered on board the ship in Russia, but after their purchase; and on the arrival of the ship in the Thames, Schneider demanded the goods of the master, who refused to deliver them up to him, but delivered them to the defendants, who were Crane's assignees. The question was, whether the possession of Usherwood, the master, was any thing more than the possession of a carrier, and not the actual possession of the bankrupt? and it was decided, that the delivery of the goods on board such chartered ship, did not preclude the consignor from stopping the goods in their transit, on board such ship, to the vendee, in case of his insolvency before actual delivery, any more than if they had been delivered on board a general ship. In both cases the possession of the master is that of a carrier. (e)

A ship, on board of which goods are loaded, must have completed her voyage before the *transitus* can be considered at an end, so as to defeat the right of the

(e) And where the vendor, on a contract for goods "free on board," on shipping the goods, tendered a receipt, acknowledging that the goods had been received on board on the vendor's account, which the mate of the defendant's vessel refused to sign, and afterwards signed bills of lading to the order of the vendees; it was held that by such refusal, the delivery on board was never complete, and consequently that the *transitus* was not at an end, so as to defeat the lien of the vendor upon the insolvency of the vendee. *Ruck v. Hatfield*. 5 B. & A. 632.

consignor to stop *in transitu* (*f*); and, therefore, where a ship¹, which ought to have performed quarantine, came into port without having done so, upon which the assignees of the consignee, who had become a bankrupt, went on board and claimed the cargo as belonging to the bankrupt's estate, and opened some of the packages, and put persons on board to keep possession, and afterwards the ship was ordered out of port to perform quarantine; and whilst the ship was performing quarantine, the agent of the consignor claimed the goods on behalf of his principal, and offered the master of the ship an indemnity against adverse claims; which claim and offer were repeated after the quarantine was ended and the ship in port; notwithstanding which, the master delivered the cargo to the assignees of the consignee. In an action of trover for the cargo, brought by the consignor against the assignees of the consignee, it was held by Lord Kenyon, that the act of the consignor's agent was a stopping *in transitu*, sufficient to maintain the action; and that, in order to give the assignees a right to claim by virtue of possession, such possession should have been obtained *on the completion of the voyage*; that, in the present case, the voyage was not completed till the ship had performed quarantine, till which time she was *in transitu*; and that as the plaintiff's agent had given notice, and claimed the cargo, before the comple-

¹ *Holt v. Pownal*, 1 Esp. 240.

(*f*) But the courts in this country will recognize the municipal law of a foreign state, which authorises the consignor to detain the goods, in case of the insolvency of the consignee, although they have been delivered on board of a ship chartered by him. *Inglis v. Usherwood*, 1 East, 515.

tion of the voyage, it was stopped time enough to prevent the property from vesting in the assignees. The plaintiff, therefore, had a verdict; and a new trial being afterwards moved for, the Court concurred in opinion with the Chief Justice. (g)

By statute 26 Geo. III. c. 59. § 4. the proprietor, importer, or consignee of wine, is required within twenty days after the ship has been entered at the custom-house, to make an entry of the wine, pay the duties, and land it; upon failure, the wine is to be conveyed to the King's warehouse, and if the duties are not paid within three months, it is to be publicly sold, to defray the duties and expenses, and the surplus (if any) to be paid to the proprietor or other person authorised to receive the same. Upon this statute has arisen a question of stoppage *in transitu*.

Leyland and Cragg, who carried on business as wine-merchants¹ had a quantity of wine consigned to them on their own account; after the ship's arrival, and before the expiration of twenty days, Leyland and Co., became bankrupts, and the duties not being paid, the wines were removed to the King's warehouse. The day before the expiration of the three months, the agent for the consignors applied, and endeavoured to get possession of the wine, but did not succeed; and the

¹ *Northey v. Field*, 2 Esp. 613.

(g) The vendor is entitled to stop the goods in every or any part of the journey to the consignee. Therefore in a very recent case, it was held, that the mere handing over of the shipping note, and delivery order to the wharfinger, before arrival, did not transfer the property so as to defeat the right of the consignor to stop the goods by an order to the wharfinger given two days before they actually arrived. *Akerman v. Humphery*, 1 Carr. 53.

wines were afterwards sold by public sale at the King's warehouse.

For the plaintiffs it was contended, that the goods had come to the bankrupt, so that the right to stop *in transitu* was gone. But Lord Kenyon held, that the plaintiffs were not entitled to recover, and he observed, that the courts had of late leaned much in favour of the consignor's power to stop his goods *in transitu*; it was a leaning in furtherance of justice. Lord Hardwicke had been of opinion, that in order to stop goods *in transitu*, there must be an actual possession of them obtained by the consignor, before they came to the hands of the consignee, but the rule has since been relaxed; and it is now held, that an actual possession is not necessary; that a claim is sufficient, and to that rule he subscribed. In the present case, the bankrupt had no title to the actual possession till the duties were paid; until then, they were *quasi in custodia legis*; before the sale the agent for the consignor claimed, and endeavoured to get possession; that was a sufficient stopping *in transitu*, in his opinion, to secure the rights of the consignor.

It is added to the report, that the plaintiff asked for a case, which was granted; but never afterwards moved. The opinion of Lord Kenyon was recognized in the case of *Nix v. Olive*, Guildhall Sittings after T. T. 1805. cited in Abbott on Merchant Shipping, p. 378., 3d Ed.

We now come to the second division of our subject. When the *transitus* shall be considered at an end: this will be seen by the following cases.

Trover for a quantity of files¹; the case was, that one Moore ordered the goods in question from the

¹ *Ellis v. Hunt*, 3 T. R. 464.

plaintiffs, who were manufacturers at Sheffield, which were accordingly sent by the waggon, directed to Moore in London. The plaintiffs drew a bill upon Moore for part of the price of the goods, which was never paid, and Moore became bankrupt before they arrived in London. Immediately upon their arrival, the files were attached by process of foreign attachment, at the suit of a creditor of Moore; but still remained at the inn charged with such attachment. A provisional assignment of Moore's effects being afterwards made to the messenger under the commission, he demanded the goods of the defendant Hunt, the carrier, and put his mark upon the cask, but did not take away the goods. After which, the plaintiffs, hearing of Moore's bankruptcy, wrote a letter to the carrier, directing him, in case the goods were not delivered, to keep them in his warehouse: and subsequently demanded them of the innkeeper, who refused to deliver them; and the attachment being afterwards taken off, the goods were delivered to the defendants, who were the assignees of Moore's estate. The Court held, that the goods having arrived at their journey's end, and having been taken possession of by the provisional assignee, who was clothed with the rights of the bankrupt, by putting his mark on them, though the local situation of them was not, nor could it be changed, on account of the attachment; that the goods were no longer *in transitu* when the plaintiffs gave notice to the carrier.

Where a part of an entire order has come to the actual possession of the vendee, the right to stop *in transitu* is gone for the whole.

As where the plaintiffs at Baltimore¹, shipped seven thousand bushels of wheat, their property, by order

¹ *Slubby v. Heyward*, 2 H. Black. 504.

and on account of George and Henry Browne, to be paid for at a future day; for which, the defendant Heyward, who was the master of the ship on board which the wheat was loaded, signed five bills of lading for the same, deliverable at Cork, or a market, to Brownes or their assigns. Previous to the arrival of the wheat, the Brownes had sold the wheat to one Scott, and had assigned the bill of lading sent to them to Scott, or his assigns, who afterwards assigned the same to Fox, the other defendant, in order that he might take possession of the wheat on arrival, on Scott's account; the ship afterwards arrived, and part of the cargo (eight hundred bushels) was delivered to Fox; after which, before the delivery of the residue, the Brownes having become bankrupt, and not having paid the plaintiffs for the said wheat, they gave notice to Heyward not to deliver the residue of the said wheat to Fox, but claimed it for themselves; notwithstanding this, Heyward did deliver the rest of the wheat to Fox, whereupon the plaintiff brought trover against Heyward and him.

But the Court were of opinion, that, under the circumstances of this case, the action could not be maintained, for the *transitus* was ended by the delivery of the eight hundred bushels, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of the delivery, to separate part of the cargo from the rest.

So¹, where a number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, *weighed the whole, and took away several*

¹ *Hammond v. Anderson*, 1 New R. 69.

bales, and then became bankrupt, whereupon the vendor within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. Held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained, in the hands of the wharfinger.

In this case, it was proved to be the custom of the trade, that the charges of warehousing were to be paid by the vendor for fourteen days after the sale. But the jury were of opinion that this was a mere indulgence to the vendee. And it was considered to make no difference, for the vendor could not avail himself of any payment he was liable to, to prevent an actual delivery of the goods from operating as such. (*h*)

(*k*) Where A. & B. the vendors of certain tallow, had purchased it of R. & Co. to be paid for in money, allowing discount, and 14 days for delivery, and R. & Co. on the same day gave the defendants, who were wharfingers, a written order to weigh, deliver, transfer, or re-house it, but it appeared that the money had neither been paid, nor the tallow weighed; after which A. & Co. sold part thereof to the plaintiffs, which was duly paid for, and the defendants gave the purchasers a written acknowledgement that they had transferred the tallow to their account, and that they were to be liable to the charges from a given date; it was held, that the defendants could not afterwards set up as against the plaintiffs, the right of R. & Co. the original vendors, to stop the tallow *in transitu*, on the ground of its never having been weighed or delivered. *Hawes v. Watson*, 2 B & C. 540.

And in a still more recent case, it was decided at *Nisi Prius*, that if the vendor of tallows in the London Dock Company's warehouses, give an order addressed to the Company, by which they are directed "to weigh, deliver, transfer, or re-house" the tallows to Messrs. M. & B.; and this order be received at the docks, and M. & B. have sold the tallows, and received the money for them, the original vendor cannot stop them in the hands of the Company, although the tallows have not in fact been weighed. It appearing, that if the sale takes place soon after the importation, it is not usually required to

We have seen in the former division of this subject, that where goods are delivered to a packer, or wharfinger to be forwarded to the consignee, the transit is not at an end by such delivery; even though such packer or wharfinger be named by the consignee; but the law is otherwise when the consignee uses the warehouse of the packer or wharfinger as his own, and has the goods sent there as to the place of their ultimate destination; in such case, the vendor's right to stop *in transitu* is as completely divested by the delivery at such warehouse, as if it were, in fact, the warehouse of the consignee.

Thus, trover for goods.¹—The goods in question were purchased of the plaintiffs at Manchester, by one Moisseron (who was the general agent, in London, of the house of Le Grand and Co. of Paris), in the name of that house; by the directions of Moisseron, the goods were sent for him to the house of the defendant in London, who was a packer, and arrived there on the 3d of September, 1802: upon their arrival there, Moisseron came to the defendant's house and had some of the goods unpacked, and sent away, and the remainder repacked; on the 7th of September, while the goods so repacked remained in the house of the defendant, news arrived that the house of Le Grand and Co. had failed; upon which the plaintiffs tendered to the defendant his charges upon the goods, and required that they should be delivered up to them. It appeared

¹ *Leeds v. Wright*, 3 B. & P. 520, 4 Esp. 245, S. C.

weigh the goods, the weight on which the custom-house duties were paid, being in such case considered by the parties as correct and sufficient. *Barton v. Boddington*, 1 Carr. 207.

that Moisseron had a general power either to send the goods to Le Grand and Co., at Paris, or to Holland, Germany, or such other market as he should think most beneficial. It was held, that as the goods were not sent to the defendant to be delivered by him to Le Grand and Co., but to Moisseron the agent of the house in London, and were there to wait his disposal; the goods were received by the defendant, not on the account of Le Grand and Co., but on that of Moisseron. The delivery to the defendant, therefore, was clearly a delivery to Moisseron, although the goods were intended for exportation; and his conduct shows that they were so considered, since after the arrival at the defendant's house, he ordered some to be unpacked and sent away, and the remainder to be repacked, consequently the goods were no longer *in transitu*.

To the same purpose is the following case :

*Trover for goods.*¹ The goods in question had been ordered by one Berkley, who was a merchant in London, of Messrs. Wallers at Manchester, and were forwarded by them, directed to him at the Bull and Mouth Inn, on the 16th of March, 1802. On the 23d of March, the goods were sent from the Bull and Mouth Inn to the house of the defendant, who was a packer, not in consequence of any order respecting those particular goods, but in consequence of a general order from Berkley, to send all goods directed to him to the defendant's house. On the 11th of March, Berkley, who lived in lodgings, and had no warehouse of his own, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the defendant's house, they were booked for the account of Berkley; and the defendant

¹ *Scott v. Pettit*, 3 B. & P. 469.

not knowing that Berkley had then absconded, and not having any directions from him respecting the goods, caused them to be unpacked, with a view to ascertain of what they consisted. On the 31st of March, Messrs. Wallers having learned the situation of Berkley's affairs, claimed the goods from the defendant; and, on the day after, they were demanded by the plaintiffs, who had been appointed assignees under a commission of bankruptcy against Berkley. The defendant being indemnified by Messrs. Wallers, refused to deliver the goods to the plaintiffs. It was holden, that in this case the *transitus* was at an end, there being no other place of delivery than the warehouse of the packer. If the *transitus* did not end there, it never could end: consequently, the delivery to the packer was a delivery to the bankrupt himself. ¹ (i)

By the case of *Bohlingk v. Inglis*, before cited, the law is settled, that there is no distinction between goods

¹ And see *Richardson v. Goss*, 3 B. & P. 187.

(i) And in a late case, where a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent shortly after their arrival in London; and goods consigned to him, remained in the waggon office of the defendants who were carriers, until they were removed by his agent for the purpose of being shipped; it was held, that such trader having become a bankrupt, his assignees were entitled to recover goods deposited with the defendants before the bankruptcy, and that the consignor had no right to stop them *in transitu*, as the trader had no warehouse of his own, and the *transitus* being at an end on the arrival of the goods at the waggon office. *Rowe v. Pickford*, 1 Moore, 526.

But if goods are delivered to the packer of the purchaser, who has no warehouse of his own, if it be understood that they are to be paid for in ready money, they may be stopped *in transitu*. *Loeschman v. Williams*, 4 Camp. 181.

imported in a general ship, and a ship chartered by the consignee for that particular voyage, as to the consignor's right to stop *in transitu*; but where a ship is hired for a term of years, by persons who, during that time, have the entire disposition and control over such ship, goods delivered for those persons on board, for exportation, cannot be stopped *in transitu*.¹

This was an action of trover², brought by the assignees of Hunter and Co., to recover the value of a certain quantity of tobacco shipped by the defendants by the order of the bankrupts, on board the *Minerva*, bound from London for Naples and Alexandria; which ship was chartered by the bankrupts for three years, from July, 1792; which was paid for by a bill at three months, drawn by the defendants on the bankrupts, and accepted by them. The goods were shipped on the 4th of February, 1793, for which the mate's receipt was given, and an invoice thereof was made out by the defendants in the names of the bankrupts. The vessel was detained by contrary winds at Portsmouth; during which time the bankrupts stopped payment. About the 11th of March, 1793, the defendants procured bills of lading to be signed by the captain to them, and obtained possession of the tobacco in September, 1794, and procured it to be relanded, and afterwards disposed of it for their own benefit. It appeared that the bankrupts during the three years were to find stock and provisions for the ship, and pay the master, and, in fact, were to have the complete controul and disposition of the ship as their own. The ship had been one voyage to Alexandria under this charter-party, and the goods in question had been bought by the bankrupts and put on board

¹ *Fowler v. M^r Taggart*, cited in 3 East, 588.

² *Fowler v. Kymer*, cited in 7 T.R. 442, 1 East. 522, and 3 East. 396. 399.

her, to be sent on a mercantile adventure. Under the circumstances of this case, it was held, that the delivery of the goods on board the ship was a complete delivery to the bankrupts, and that the goods not being *in transitu*, could not be stopped; and consequently the plaintiff recovered.

And it seems that the general principle established by this case is, that if goods be delivered in this country on board a ship chartered by the vendor, it is, in effect, a delivery to the vendee.¹

To deprive a vendor of his right to stop *in transitu*, it is not necessary that the goods should be delivered at the vendee's place of abode; it is sufficient that they have come into his possession, and that he has exercised acts of ownership over them, though at a place short of their original destination. (k)

The plaintiff², who was a manufacturer at Norwich, had entered into an agreement with one Shevill for the purchase of four pipes of port wine. Shevill wrote up to his correspondent in London, a person of the name of Farquharson, to send the wine. He purchased it from Bamford, Bruin, and Co., and had it shipped; and,

¹ Per Lawrence, J. in *Inglis v. Usherwood*, 1 East, 525, and also in *Bohlingk v. Inglis*, 3 East, 399.

² *Wright v. Lawes*, 4 Esp. 82.

(k) Where goods were entered in the books of the West India Dock Company, in the name of A., who received the usual delivery order for them, which upon a sale of the goods to B, he indorsed and delivered to him, who again upon another sale delivered the order to C. the last purchaser; it was held upon C.'s insolvency, that the *transitus* from A. was at an end, and that he could not take possession of the goods, although they had continued in the company's books in his name, and the order had not been lodged with the company. *Spear v. Traversi*, 4 Camp. 251.

by the bill of lading, consigned the wine to the plaintiff by a vessel employed in the course of trade between Yarmouth and London. When the wines arrived at Yarmouth, one Broadman, as the agent of the plaintiff, received the wines on his account; but his own cellars not being large enough to hold them, he applied to the defendant, who took them into his cellars, and was to be paid the warehouse rent by the plaintiff. Two days after, the plaintiff, being then at Yarmouth, went to the defendant's cellars, where the wines were deposited, and tasted and sampled them. While the wines remained in the defendant's possession, Bamford, Bruin, and Co. discovered that Farquharson, to whom they had sold the wines, was a swindler, and a man of no property: they therefore stopped the goods in the defendant's possession, and gave him an indemnity.

In an action for the non-delivery of these wines, Lord Kenyon held, that there was no colour for saying these goods were *in transitu*, the consignee having exercised acts of ownership over the wines by tasting and sampling them, and paying warehouse rent; and although they had not reached the plaintiff's place of abode, where they were to be ultimately delivered, yet there was a complete delivery at Yarmouth, by the delivery to the plaintiff's agent, *according to the bill of lading.* (1)

(1) And where the defendants had sold a quantity of timber, then lying at their own wharf, to I. S., for bills payable at a future day; which timber was then marked by I. S., and a small part of it forwarded by the defendants to one place, and part to another, and then I. S. before the time of payment arrived, sold the whole of it to the plaintiffs. They notified the sale to the defendants, who answered that it was very well, and afterwards in their presence, the plaintiffs put their mark upon the whole of the timber lying in

This last case may, upon a cursory view, appear to be at variance with the case of *Holst v. Pownal*¹, cited in this section, which determines that the *transitus* in goods continues till they arrive at the ultimate place of destination, and that the consignee's getting possession of them before such arrival, shall not divest the right of the consignor to stop *in transitu*; but it may be observed, that both that case and the one last cited arose upon a transit under a bill of lading, by which the captain of the ship undertakes to deliver the goods to the consignee *at a certain place*, and consequently the consignee has no authority to demand them before their arrival there: but in the case of carriage by land, where there is no such undertaking, it seems that if the vendee meet the goods upon the road, and take them into his own possession, the goods will then have arrived at their journey's end, with reference to the right of stoppage.² Now, here the goods being deliverable by the bill of lading at Yarmouth, though an ulterior destination was contemplated by the parties; the vendor's right of stoppage being defeated by the actual possession of the

¹ 1 Esp. 240.

² Per Lord Alvanley in *Mills v. Ball*, 2 B. & P. 461.

the defendants' wharf, and also that which had been forwarded to the other two places; it was held that such assent to the transfer, and marking by the plaintiffs, constituted a complete delivery to the plaintiffs, and a consequent termination of the *transitus*, which deprived the defendants of all right to stop the timber *in transitu*. *Stovell v. Hughes*, 14 East, 308.

But so long as any thing remains to be done, as the weighing of goods, the delivery is not complete until that is performed, and consequently the *transitus* is not at an end. *Withers v. Lye*, 4 Camp. 237.

goods taken by Wright at Yarmouth, is perfectly consistent with the principle of the cases cited. (*m*)

Where goods, which are ordered for the purpose of being sent abroad, have come to the hands of an agent of the vendee, in whose hands they were to remain until the agent received orders as to their ulterior destination, the right to stop *in transitu* is gone when the goods arrive at the hands of such agent. (*n*)

Trover¹ for eighteen bales of cotton twist; it appeared that the goods in question had been furnished by the defendants, cotton dealers at Manchester, to the order of Battier, a trader, living in London, whose course of dealing it was to send orders to the defendants for goods of this description, to be forwarded to Metcalfe and Co., at Hull, for the purpose of being shipped to the correspondents of Battier at Hamburgh, and by those correspondents sent to the persons for whom the goods were intended. When the goods arrived at Hull, the Metcalfes received orders from Bat-

¹ *Dizon v. Baldwin*, 5 East, 175.

(*m*) To such a length has this been carried, that it has been held, that where the freighter of a ship to Spain and Portugal, or either, as the master should be directed by the freighter or his agents, had first directed him to proceed to Lisbon, in consequence of which the master had taken in goods, and signed bills of lading to that port, the freighter could not afterwards countermand that order, and direct him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering a sufficient indemnity to the master against the consequence of his liability thereon. *Davidson v. Gwynne*, 12 East, 381.

(*n*) Where goods were delivered to the vendee at a wharf, who afterwards shipped them there, it was held that no subsequent stoppage *in transitu* could take place. *Noble v. Adams*, 2 Marsh, 366.

tier when and to whom to ship the goods in Hamburg. This course of dealing had subsisted between the parties for four years; and as Battier received orders from abroad for cotton twist, he from time to time gave orders to the defendants to send the goods to Metcalfe and Co. at Hull, to be shipped for Hamburg, as usual. Of this import was the order for the goods in question, which was sent by Battier to the defendants, in a letter dated the 31st of March, 1803, in which the goods were directed "to be packed in bales, marked G. S., (and a certain mark) for order, and to be forwarded to Messrs. Metcalfe and Sons, to be shipped for Hamburg, as usual." The goods were accordingly sent by the defendants to the Metcalfes at Hull, marked and made up in the manner directed. In the beginning of July following, Battier stopped payment, of which the defendants being immediately apprized, one of them proceeded to Hull, and stopped the goods in the hands of the Metcalfes on the 7th of July, and some time after in the same month took possession of them, upon giving the Metcalfes an indemnity. Four of the bales had been actually shipped on board a vessel about to proceed to Hamburg: but they were afterwards relanded upon the application of the defendants, and were returned to them with the rest which had remained in the warehouse of the Metcalfes from the time of their arrival at Hull. One of the Metcalfes, who was examined as a witness, stated, that at the time of the stoppage of the goods, they held them for Battier, and at his disposal; that they accounted with Battier for the charges of the goods; and the witness described his business to be merely an expeditor, agreeably to the directions of Battier; a stage and mere instrument between the buyer and seller. That he had no authority to sell the goods,

and frequently shipped them without seeing them. That the bales in question were to remain in his warehouse for the orders of Battier; and that he had no other authority than to forward them. That at the time the goods were stopped, he was waiting for the orders of Battier; that he had shipped the four bales, expecting to receive such orders, and relanded them because none had arrived. That if the goods had been demanded by Battier before shipping, he should have delivered them up to him. The question was, whether the defendants had a right to stop the goods *in transitu*, at the time they took possession of them? And it was held, that the goods in question having got so far to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, without which orders they would continue stationary; the *transitus* was at an end. As between the vendor and vendee the goods had arrived at their ultimate place of destination, and consequently the right of stoppage was gone.

So if goods, after they are sold, remain in the warehouse of the vendor, and he receives warehouse rent for them, this is as much an executed delivery of the goods to the vendee, as if goods bought of a third person had been delivered at such warehouse, which, in respect of the warehouse rent, is the warehouse of the vendee; and such delivery puts an end to the vendor's right to stop *in transitu*.¹ (o)

¹ *Hurry v. Mangles*, 1 Camp. 452.

(o) And in another case, where a wharfinger in whose custody goods laid, had with the privity of the vendor, transferred the goods

Following the plan proposed, for the arrangement of the cases on this subject, we are now to consider by whom, and under what circumstances, the right of stoppage *in transitu* may be exercised?

From what has already been said of the right of stoppage *in transitu*, it will seem, that to entitle any one to this right, he must stand in the relation of vendor to the bankrupt (*p*): and therefore where a trader here gives an order to his correspondent abroad for goods, which the latter procures upon his own credit, though he charge no advance upon the invoice price, but merely takes a commission, he is to be considered as the vendor for the purpose of stopping the goods *in transitu* upon the insolvency of the trader here (*q*); thus, where it appeared¹ that in June 1801, an order was given by Browne the bankrupt, to Fritzing, his correspondent

¹ *Feise v. Wray*, 3 East, 93.

from the name of the vendor to that of the vendee, and had charged him with warehouse rent; it was held, that he held them for the vendee, and that the vendor's right of stoppage *in transitu* was at an end. *Harman v. Anderson*, 2 Camp. 243.

(*p*) The shipper of goods, who has taken a receipt from the captain, who afterwards executes a bill of lading to a sub-vendee without the privity of the shipper, may stop the goods *in transitu*, notwithstanding the bill of lading, and upon the refusal of the captain to deliver up the goods, may maintain trover against him. *Craven v. Ryder*, 2 Marsh, 127.

(*q*) And now by the new statute 6 Geo. 4. c. 94. of which an abstract is given in a former place, it is expressly enacted that persons intrusted for the purpose of consignment or sale with any goods, wares, or merchandize, and who shall have shipped the same in their own names, and any persons in whose names goods shall be shipped by any other persons, shall be deemed and taken to be the true owners thereof, so far as to entitle the consignees to a lien in respect of money or securities.

abroad, to purchase a quantity of wax for him. Fritzing bought it accordingly of another merchant, who was a stranger to Browne, and had no account or correspondence with him, nor was there any privity between Browne and the merchant of whom the wax was purchased. On the 2d of August the wax was shipped, and on the 4th, Fritzing drew bills of exchange on Browne for the invoice price of the wax, including his commission, *payable to his own order*, which Browne accepted. On the 10th of August, Browne received the invoice and bill of lading; and on the 2d of September, not having paid the bills, he became bankrupt. On the next day, the defendant, on behalf of Fritzing, (being his agent under a general power of attorney), obtained from the bankrupt's brother, the bill of lading and invoice, and afterwards obtained possession of, and sold the wax. In an action of trover for the wax, brought by the assignees of Browne, it was held, that Fritzing was to be looked upon as the vendor of the goods; for the name of the original owner was never made known to the bankrupt; there was no privity between them; but the goods were sold and the bills drawn in Fritzing's own name; he therefore had a right to stop the goods *in transitu* on the insolvency of Browne.

So also a person who consigns goods on the joint account of himself and the consignee, may stop such goods *in transitu* upon the failure of the latter.

Trover for certain barrels of beef, and certain other barrels of pork.¹ The pork (*r*) in question was shipped

¹ *Newsom v. Thornton*, 6 East, 17.

(*r*) The case so far as respects the beef, was decided upon another point, not material in this place.

on board the Russel in May 1803, and consigned by the plaintiffs, who were Irish provision merchants, residing at Cork, to Church, a merchant in London, *on the joint account of themselves and Church*. The bill of lading, signed by the captain, was dated "Cork, 20th of May 1803," to deliver "to Matthew Church, or his assigns." The plaintiffs, at the same time drew a bill on Church for half the amount of the shipment; but it was never paid, or even presented, in consequence of the subsequent bankruptcy of Church. The bill of lading, as soon as received by Church, was, without the privity of the plaintiffs, by him indorsed and delivered to the defendants, upon condition of their making an advance to him upon it, which they failed to do, but claimed to retain it as a security for prior advances made to him. The question was, if under these circumstances the plaintiffs had a right to stop the pork *in transitu*, Church having become a bankrupt; and it was held, that they had; for though Church, as a *joint owner*, had a right to pledge the bill of lading, yet having agreed to pledge it to the defendants, on a condition which had not been performed, there was no consideration paid by them for the bill of lading, and consequently there was nothing to divest the original right subsisting in the consignors to stop *in transitu*, upon the insolvency of the consignee.

But a mere surety, upon whose credit, and through whose intervention, goods are purchased of a merchant abroad, is not such a vendor *quoad* the consignee, as to exercise the right of stopping *in transitu*; as the following case will show.

Trover for a quantity of wheat.¹ The case was shortly this:—Browne, a merchant in London, in July

¹ *Siffken v. Wray*, 6 East. 371.

1801, gave an order to Dubois and Co. of Dantzic, to ship for him the wheat in question, and draw for the amount on one Fritzing of Hamburg, (who had agreed to accept the bills in consideration of a commission on the amount); and to forward the shipping documents to him, through Fritzing. The wheat was accordingly shipped on the 18th of August; Dubois and Co. drew for the amount on Fritzing, who accepted the bills, and on the same day Dubois and Co. transmitted two bills of lading (one of which was made deliverable to Dubois and Co. or order, and the other unto order, or assigns), indorsed in blank, both of which Fritzing, on the 28th of August 1801, forwarded to Browne, without indorsing them. Before the arrival of the bills of lading on the wheat, Browne became bankrupt. Fritzing having also stopped payment, the bills drawn upon him were dishonoured. In this state of things, the goods arrived, and by the consent of Browne were taken possession of by the defendant (who was the general agent in London of Fritzing), for the purpose of applying the net-proceeds in discharge of the bills drawn on account of the shipment. This arrangement was subsequently approved of by Dubois and Co., in a letter to the defendant. The assignees of Browne, however, demanded the wheat of the defendant, who claimed to retain it as legally stopped *in transitu*. The question for the opinion of the court was, Whether they were entitled to recover? And it was held, that Fritzing had no right to stop the goods *in transitu*, he being a mere surety for the payment, and the relation of vendor and vendee not subsisting between him and Browne; neither could the defendants retain the goods on the account of Dubois and Co., he being no agent of theirs, and not having authority from them *at the time* of such

stoppage *in transitu*; and the subsequent ratification of the defendant's act could not make it a stoppage *in transitu* on their account by relation.

Where a bill of lading is indorsed to an agent, without consideration, merely for the purpose of enabling him to stop goods *in transitu* for his principal, although, if he be fortunate enough to get possession first, he may retain the goods against the consignee, yet it seems he can maintain no action for them *in his own name*; for such indorsement, without consideration, transfers no property; he must therefore sue in the name of his principal.¹ (s)

But, though it is a general rule, that the consignor is entitled to reclaim goods at any time during their transit to the hands of an insolvent consignee, yet that right may be restrained or defeated by the peculiar circumstances under which the consignment is made; as where goods are consigned in pursuance of an agreement between the consignor and third persons, to be applied in the execution of certain trusts; in such case, the consignor cannot countermand the delivery on the failure

¹ *Waring v. Cox*, 1 Camp. 369.

(s) But where H. shipped goods at Dundee, to the order of, and for P. in London, and having ascertained shortly after the goods had been forwarded, that P. had stopped payment, indorsed and forwarded the bill of lading to the plaintiff, who demanded the goods of the defendants, who were the wharfingers in whose custody they were; it was held, that the plaintiff had a sufficient title to maintain trover, although he did not prove that he had given value for the bill of lading: and the court distinguished this case from that of *Waring v. Cox*, on the ground that at the time of the plaintiff's demand, the goods were *in transitu*. *Morison v. Gray*, 2 Bing. 260.

of the consignee in trust, while such trusts remain unsatisfied (t), as has been decided in the following case.

Messrs. Smiths and Atkinson¹ were merchants and bankers residing in London, and carrying on business under two different firms; namely, the banking business under the firm of Samuel Smith, Sons, and Co., and the business of merchants, under the firm of Smiths and Atkinson. George and Henry Brown, merchants in Liverpool, kept an account with Samuel Smith, Sons, and Co., as their bankers; and in January 1798, wishing to increase their drafts to a much greater amount than had been at first intended, entered into an agreement with them to the following effect; that the Browns should be at liberty to draw five thousand pounds *per* week, from the first of February to the 12th of March, upon Samuel Smiths, Sons, and Co. remitting them good bills of exchange on London, to cover the amount; *and that as a collateral security, they should consign to the house of Smiths and Atkinson, hemp and iron to the amount of ten thousand pounds on sale for their account.* This agreement was entered into for the accommodation of the Browns, and entirely at their request. In consequence of this agreement, the Browns did draw upon Samuel Smith, Sons, and Co. to a con-

¹ *Huille v. Smith*, 1 B. & P. 565.

(t) The courts have made a distinction between the cases, where bills are accepted on the faith of a particular consignment, which constitutes a specific pledge of the cargo; and cases where there is a mutual credit only between the factor and his principal. In the latter case, the factor will not have such an interest in the consignment, that the indorsement of the bill of lading to him will divest the unpaid vendor of his right to stop the goods *in transitu*. *Patten v. Thompson*, 5 M. & S. 350.

siderable amount; and in pursuance of the agreement, on the 13th of February, 1793, remitted to Smiths and Atkinson the invoice and bill of lading, indorsed in blank, of a quantity of iron and hemp, by the ship *Hawke*, of which the plaintiff in error (*Haille*) was captain. In the correspondence which took place between Smiths and Atkinson, and the Browns, subsequent to this consignment; the former applied to the latter for directions respecting the disposal of the goods, and the prices they might be willing to take. An insurance was effected in the names of Smiths and Atkinson, who were to receive the usual commission on the sale. At the time when the invoice, and bill of lading were remitted, the *Hawke* was in the port of Liverpool, and ready to sail for London, but was prevented from sailing by an embargo. The Browns, being at that time considerably in arrear to Smith, Sons, and Co., on the 5th of April, 1793, were declared bankrupts; in consequence of which, Smiths and Atkinson having demanded the goods in question of the captain of the *Hawke*, which was still lying in the port of Liverpool, and tendered the charges, the latter refused to deliver them, alleging that he had orders to that effect from the assignees of the Browns, to whom he afterwards delivered them. Upon these facts being proved at the trial, Mr. Justice Lawrence, before whom the cause was tried, directed the jury that the consignment to Smiths and Atkinson was not a consignment to them as factors or agents only of the Browns, acting merely for the benefit of their principals, but was a consignment to them, not only to sell the goods under the directions of the Browns, but also by the produce thereof to protect and indemnify the banking-house of Samuel Smith, Sons, and Co. against their advances and acceptances

on account of the Browns; and that the law as between principal and factor did not apply in this case; and, therefore, that the captain's refusal to deliver was evidence of a wrongful conversion, and the plaintiffs below were entitled to recover in trover. To this direction a bill of exceptions was tendered.

After two arguments, the Court of Error decided that the moment the goods were put on board the Hawke, and the bill of lading indorsed, and remitted to Smiths and Atkinson, the property was changed, and was to remain in their hands clothed with the trust, expressed in the agreement, and therefore affirmed the judgment below.

If, however, the property of goods be once vested in the consignee by a consignment on his account and risk, to be paid for at the expiration of a limited credit, or by bills at a given date, it is not competent to the consignor to repossess himself of the goods during their transit, upon the refusal of the consignee to pay ready money for them, he remaining solvent. (u)

In trover for a quantity of timber¹, it appeared in evidence that the plaintiff, a merchant at Liverpool, gave an order for the timber to Schumann and Co., mer-

¹ *Walley v. Montgomery*, 3 East, 584.

(u) Lord Stowell in his admirable judgment in the case of the *Constantia*, lays it down as a principle of the mercantile laws, "that the right of stoppage *in transitu* can only be exercised in the sole case of the *insolvency* of the consignee; and that although the right may be exercised provisionally, yet if the insolvency do not take place, the act which has been done is a mere nullity, and the seller has exercised a power to which the law does not ascribe any legal effect." *Case of the Constantia*, 6 Rob. 321.

chants, residing at Memel; in pursuance of which Schumann and Co. informed the plaintiff by letter of the 1st of May, 1802, that they had chartered on his account the ship *Esther*, Captain *Rose*, of *Liverpool*; and on the 15th of May, they wrote him another letter, inclosing him the bill of lading and invoice of the timber, and saying, that they had sent the charter-party in a letter which Captain *Rose* would deliver; and advising the plaintiff further, that they had drawn on him certain bills at three months for the value of the timber. The invoice expressed the timber to be shipped *on the account and risk of Walley*; and the bill of lading was unto order or assigns, *he or they paying freight according to charter-party*, and indorsed in blank by Schumann and Co. Schumann and Co. sent another bill of lading of the timber to the defendant, their agent, by virtue of which he got possession of the cargo before the plaintiff had demanded it: but, on the 21st of June, two days after the arrival of the timber, finding that the defendant had obtained possession of it, he applied to him offering to accept the bills drawn on him by Schumann and Co., and demanding the timber, which the defendant refused, unless the plaintiff would pay for it immediately. This the plaintiff refused to do, in consequence of which, the defendant retained possession, and afterwards sold the cargo under the authority of Schumann and Co. The plaintiff then demanded the cargo of the captain, and brought this action; but there was no proof of any tender of the freight for want of which the plaintiff was nonsuited. Upon a motion to set aside this nonsuit, and for a new trial. — It was resolved, that it appearing by the invoice, that the goods were shipped *for account and at the risk of the plaintiff*, the property of the cargo was vested in him by the bill

of lading and invoice, and delivery of the goods to the captain, subject only to the right of stoppage *in transitu*, which could not be exercised in this case; the plaintiff being ready to accept the bills. And that as to the payment of freight, that was a question between the captain and the plaintiff, with which the defendant had no right to concern himself.

It has been seen, that the right of stoppage *in transitu* can only be exercised where the relation of vendor and vendee subsists between the consignor and consignee; and, therefore, a person who has a mere lien upon goods, without any property in them, cannot, after having parted with the actual possession, repossess himself of such goods while *in transitu*. (v)

Upon this principle, where one Gard¹, a clothier in London, before his bankruptcy employed Pym, the defendant, a fuller in Exeter, in his business. At the time of the transaction after mentioned, the bankrupt was indebted to the defendant, upon the general balance of account, in more money than the value of the goods in question; and, by the custom of the trade at Exeter, the defendant had a lien for his general balance. The

¹ 1 *Sweet v. Pym*, 1 East, 4.

(v) The right of stoppage *in transitu* must depend upon the state the parties were in at the time when the bills of lading were signed and indorsed; thus, where A. being indebted to B. on a balance of account, including bills of exchange accepted by B. for A., and still running, consigned goods to B. on account of this balance; it was held, that A. had no right to stop the goods *in transitu*, upon B's becoming insolvent before the bills were paid, because the circumstance of A. being indebted to B. on the balance of account, divested him of all controul over the goods, from the time of the shipment. *Vertue v. Jewell*, 4 Camp. 31.

cloths for which the action was brought had been sent by Gard, before his bankruptcy, to the defendant, to be fulled as usual; and after they were finished, the defendant, in consequence of prior orders from Gard, shipped them on board a certain vessel at Exeter, to be forwarded to him in London, and sent the invoice to Gard. No bill of lading was signed by the captain at the time of the shipment; but soon after the vessel sailed, Pym, hearing of Gard's bankruptcy, followed, and overtook the captain off Deal in his passage to London, and procured him to sign a bill of lading to himself or order; by virtue of which, Pym obtained the delivery of the goods on their arrival in London. It was held, that the right of lien only continues while the goods are in the possession of the party claiming it; and that here the goods being shipped by the order and on the account of the bankrupt, who was to pay the freight, the custody was changed by the delivery to the captain; and that, therefore, Pym having once parted with the possession of the goods, could not stop them *in transitu*, and thereby revive his lien. (w)

Where the consignor of goods has a right to stop *in transitu*, such right is not affected by the circumstance of a partial payment, or the consignee having accepted bills drawn upon him on account of such goods, though such bills are not due. (x) Thus, in the case of *Hodgson*

(w) It has been held at *Nisi Prius*, that a remittance of money for a particular purpose, may be stopped *in transitu*; but that a general remittance of cash from a debtor to his creditor cannot. *Smith v. Boules*, 2 Esp. 578.

(x) And where a sale which would be otherwise illegal, has been legalized by a licence from the crown, the vendor may stop the goods *in transitu*, although he be an alien enemy. *Fenton v. Pearson*, 15 East, 419.

and others, assignees of *Ward*, a bankrupt, v. *Loy*¹, which was an action of trover to recover a quantity of butter. The plaintiffs claimed as assignees under a commission of bankrupt against *Ward*, dated the 25th of March, 1797. In the beginning of February, prior to his bankruptcy, the bankrupt, who was a butter-merchant, residing in Cumberland, purchased sixty firkins of butter of one *Cowper*, at forty-one shillings *per* firkin, and paid one halfpenny earnest. It was originally agreed, that *Ward* was to pay forty pounds of the purchase-money in cash upon the Tuesday se'nnight following the contract, on which day the butter was to be delivered. The forty pounds were not paid on the day specified; but on that day *Ward* purchased of *Cowper* forty-four and a half other firkins of butter, making, in all, one hundred and four and a half; and *Cowper* being indebted to *Ward* in the sum of twenty pounds, *Ward*, in addition to that sum, paid him thirty pounds more on account of the butter, and promised to send him a bill for one hundred pounds, which he afterwards did; but that bill, when it became due, was not paid. Upon the bankruptcy of *Ward*, the goods were stopped *in transitu* by the vendor; and it then became a question, whether the circumstances of part payment by the vendee took the case out of the general rule.—Lord Kenyon was of opinion, that it did not; but the other Judges expressing a wish to have an opportunity of examining the cases upon that point, the case stood over; and afterwards Lord Kenyon delivered the opinion of the Court, in substance as follows:—We have looked into the cases cited, and, as it is a case of great consequence to the commercial world, and as

it is of vast importance that questions which have been long settled should not be set afloat again on account of some trivial circumstances that formed no ingredient in some of the decisions in which the general doctrine was established ; and, as we have no doubt ourselves on the subject, we think that the case should not be argued again. When the distinction was first taken at the Bar, I thought it not well founded ; and, on looking into the cases that were referred to in support of it, we are clearly of opinion that the circumstances of the vendee having partly paid for the goods, does not defeat the vendor's right to stop them *in transitu*, the vendee having become a bankrupt ; and that the vendor has a right to retake them, unless the whole price has been paid. And, indeed, the Lord Commissioners seem to have been of the same opinion in the case of *Wiseman v. Vandeput* ; for they " decreed an account, that if any thing were due from the Italians (the consignors) to the Bonnells (the consignees), that should be paid to the plaintiffs ; but they should not have the value of the silks by virtue of the consignment." Therefore, we would not have it supposed that there is any doubt on the question. The consequence is, that the *postea* must be delivered to the defendant.(y)

So, in the case of *Feise v. Wray*¹, stated in a former part of this section, though the consignee, before his

¹ 5 East, 93.

(y) And if a factor in consideration of goods being consigned to him, accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his *actual* possession, the consignor may stop them *in transitu*. *Kinlock v. Craig*, 3 T. R. 119.

bankruptcy, had accepted bills drawn on him by his correspondents for the amount of the goods; which bills, it was contended, might be proved under the commission against the consignee; it was held, that such bills were, at most, but a partial payment, and, therefore, did not take away the vendor's right to stop the goods.

Nor is this right of the consignor affected by an usage for carriers to retain goods upon which they claim a lien, for a general balance of account between them and the consignees, even if such a lien could be supported. Thus, in *trover* for goods¹, it appeared that the defendant was a common carrier from London to Exeter and Plymouth, and as such received the goods in question from the plaintiffs, by whom they were consigned to the house of Negretti and Co., at Plymouth; that Negretti and Co., when they ordered the goods to be sent, gave no directions respecting any particular carrier, and that there was another carrier from London to Plymouth besides the defendant; that, previous to the arrival of the goods at Plymouth, Negretti and Co. had failed, and a notice had been given to the defendant by the plaintiffs not to deliver them to Negretti and Co., the plaintiffs, at the same time, tendering the defendant his charge of one pound seven shillings and two-pence for the carriage of the goods, and offering to indemnify him; that the carriage of the goods was to have been paid by Negretti and Co., if the goods had been delivered to them; and that the sum of four pounds seven shillings was due from Negretti and Co. to the defendant for the carriage of other goods; that the defendant offered to deliver the goods to the

¹ *Oppenheim v. Russell*, 7 B. & P. 42.

plaintiffs, on their paying him the two sums of four pounds seven shillings, and one pound seven shillings and two-pence, and indemnifying him; that the defendant, previous to this transaction, had given notice, by circulating hand-bills, and advertisements in the London Gazette and other newspapers, that all goods which should be delivered for the purpose of being carried would be considered as general liens, and subject not only to the money due for the carriage of such particular goods, but also to the general balance due from the respective owners to the proprietor of the waggon; and that one of the abovementioned hand-bills had been delivered to Negretti and Co. The defendant then offered evidence of the usage of carriers to retain for a general balance; but Lord Alvanley, who tried this cause, rejected the evidence, being of opinion that it was not admissible, and that the consignor's right to stop *in transitu* could not be affected by such usage, if established. A verdict was therefore found for the plaintiffs, with liberty to the defendant to apply to the Court for a new trial.

A rule *nisi* for that purpose was obtained; but the Court agreed with the Chief Justice, and observed that this lien, at the most, could only amount to a special agreement between the carrier and consignee, and could not possibly interfere with the legal right allowed to the consignor of stopping *in transitu*; and they therefore discharged the rule. (s)

Neither is such right to stop *in transitu* defeated by the goods being attached by process of foreign attach-

(s) If a carrier, after notice from the vendor of goods to stop them *in transitu*, by mistake deliver them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee. *Litt v. Cowley*, 7 Taunt. 169.

ment from the Mayor's Court in London, at the suit of a creditor of the consignee, who can obtain no greater right over the goods than the consignee himself. The vendor's power of intercepting the goods is the elder and preferable lien, and is not superseded by the attachment, any more than by the general right of a common carrier to retain all his customer's goods for his general balance, which has been decided against the carrier.¹

It ought to be observed, that stopping *in transitu* is an adverse act; and therefore, if it be not done *eo intuitu*, it shall not divest the property of the consignee; as if goods are returned to the vendor by agreement between him and the vendee. Thus, in the case of *Siffken and another, Assignees of Brown, v. Wray*², fully stated in a former part of this section, where the agent of the consignees had obtained the bill of lading from the bankrupt after his bankruptcy, upon an agreement when the goods arrived to dispose of them, and to apply the net proceeds in the discharge of such bills as had been drawn against the goods, it was held that he could not retain the goods so obtained by agreement with the vendee, after his bankruptcy, against the assignees, there being no adverse stopping *in transitu*.

But in the case of *Mills v. Ball*³, before mentioned, where the consignee of goods, being insolvent, and having committed an act of bankruptcy, wrote to the consignor to inform him of his circumstances, and to say that he would not receive the goods; in consequence of which information the consignor obtained possession of the goods whilst *in transitu*. It was doubted whether the defendant could avail himself of a

¹ Per Lord Ellenborough in *Smith v. Goss*, 1 Camp. 284. and see *Ellis v. Hunt*, 3 T. R. 464.

² 6 East, 371.

³ 2 B. & P. 457.

possession obtained by means of this honest communication of the bankrupt, in an action by the assignees. Mr. Justice Heath said, — “ In this case doubts have arisen with some of the Court respecting the effect of the letter of the 16th of September (containing the information of the consignee’s insolvency). It appears to me, however, that it will not vary the plaintiff’s right. In *Berwick v. Atkin*, 1 Str. 165¹, the refusal by the bankrupt to receive the property seems to have been considered meritorious. So I think that the conduct of the bankrupt in this case was commendable.” — Rooke, J. “ The claim (of the consignor) was made in consequence of the information (which appears to have been very proper) that circumstances had arisen in the affairs of the consignee which made it improper for him to receive the goods. *In what manner that information was obtained can make no difference in the case.* The honesty of the consignee ought not to prejudice the plaintiff’s right. If, indeed, the consignee, after getting the goods into his hands, had given them up, the case would have been very different; but here the information was while the goods were *in transitu*.” And Chambre J. observed, that “ the vendor did not get possession of these goods by his own diligence and care, or in consequence of casual information, but through the intervention of the bankrupt himself, eight days after the act of bankruptcy committed. That circumstance raised some doubt in my mind, since it appeared that the bankrupt had thereby given a preference to the plaintiff over the rest of his creditors; but still, upon the whole, I am inclined to agree with the rest of the Court. I am not fond of multiplying

¹ And see Cowp. 125.

small distinctions, and think that too many have already been taken; and the general inconvenience will not be great, since many cases of this kind are not likely to arise. It seems, indeed, that there will be a certain degree of discretion vested in the bankrupt, since he will be empowered to accept goods which are coming to him from one consignor, and to give notice to another consignor to stop them *in transitu*. But as no fraud appears to have been committed on the part of the plaintiffs in this case, I am inclined, though not without some doubt, to concur with the rest of the Court."

It must be admitted that the authority of this case, which seems not to have been decided without great doubt, is considerably shaken by the preceding case of *Siffken v. Wray*. The distinction between them is very fine spun. I apprehend it lies here; — that in *Siffken v. Wray* the possession of the consignor was obtained by the act of the bankrupt, who delivered up the bill of lading, without which (for the agent had no duplicate,) the goods could not have been stopped; whereas, in the last case, the stoppage was only effected through the means of the bankrupt, by his giving notice.

In drawing this distinction I must own I feel pressed by the case of *Feise v. Wray*¹, (which we have had occasion to notice before in this section). In that case the possession of the goods was obtained by the general agent of the consignor obtaining the bill of lading from a servant of the bankrupt, after the bankruptcy. Upon that part of the case, Mr. Justice Gress observed, that "the defendant, acting under an authority from Fritzing (the consignor), applied, upon the bankruptcy, to Browne (the consignee) for the purpose of getting se-

¹ 3 East, 93.

curity for the goods, and received the bill of lading from the bankrupt's brother, as he honestly might, and which the other acted honestly in giving up to him. This is agreeable to what Lord Hardwicke said in *Snee v. Prescott*¹, that if the consignor get the goods again, by any means short of felony, he should not blame him." — It should be recollected that the point here noticed was not the principal point made, nor was it much pressed; and also, that it was decided *before* the case of *Siffken v. Wray*. As to the expression used by Lord Hardwicke in *Snee v. Prescott*, that, I conceive, must be understood with reference to the particular case in which it was used. In that case, the goods were seized by the consignor *adversely* to the vendee, and not, as in this case, actually returned by the consignee.

But, where goods have been seized by the vendors, under a claim of a right to stop them *in transitu*, though in point of fact the *transitus* was then at an end, it is competent to an insolvent vendee, who has not committed any act of bankruptcy, to give up such goods to the vendors, provided they are given up *bond fide*, and not from motives of voluntary and undue preference. Thus, where² Battier and Son, traders in London, had ordered a quantity of cotton-twist of Baldwin and Co., cotton-dealers at Manchester, to be forwarded to Metcalfe and Co., at Hull, there to wait the order of Battier and Son, which goods were accordingly sent; and shortly after the Battiers stopped payment, of which Baldwin and Co. being apprised, one of them proceeded to Hull, and stopped the goods in the hands of Metcalfe and Co., and afterwards got possession of them. At the time when the defendants

¹ 1 Atk. 250.

² *Dixon v. Baldwin*, 5 East, 175.

gave notice to the Metcalfes to stop the goods, they also applied to the Battiers to order them to be delivered up. The Battiers in the mean time called a meeting of their creditors in London, and the case was laid before counsel, concerning their right to restore the goods to the defendants; the result of which meeting and opinion was stated in a letter of the 29th of July, from the Battiers to the defendants, in which they informed them, that "Yesterday a meeting was held of their several creditors resident in London, when they unanimously resolved, that it would be most for the interest of the concerned, that the affairs should be put in trust, and that the property should be divided, from time to time, amongst the creditors: That the opinion obtained from counsel, and which, they were happy to say, agreed with their own wishes, was likewise submitted to their consideration; and it appeared generally the opinion, that the twist in Hull should be given up." There was also another letter, of the 7th of September, from the Battiers to the defendants, inclosing a statement of their affairs; in which they observed, that the defendants "claim is stated according to what they conceive it to be, after deduction of the goods stopped at Hull." The Battiers committed no act of bankruptcy till the 26th of September, 1803, on which act of bankruptcy a commission issued on the 1st of October. The assignees afterwards demanded the goods, which the defendants refused to deliver up. Upon the question whether the Battiers were in a condition to rescind the contract, and, if so, whether they had done any act amounting to a rescinding before their bankruptcy? it was held, that the bankrupts were competent to rescind, and had, in fact, rescinded the contract for the sale of these goods. The circum-

stances of deliberation, advice of counsel, and other circumstances of the case, having been left to the jury, as evidence that the transaction was *bonâ fide*, and not from motives of undue preference; and the jury having found that the bankrupts had acted *bonâ fide*, notwithstanding the Battiers must have considered themselves in a state of insolvency and impending bankruptcy, yet, as they had in fact committed no act of bankruptcy, the *jus disponendi* over the goods remained by law in them; and, having rescinded this contract in the *bonâ fide* exercise of that right, the defendant was entitled to retain the verdict found for him.

Mr. Justice Lawrence differed from the rest of the Court on this point. He considered that the letter of the 29th of July was no recognition, on the part of the bankrupts, of the act of the defendants in stopping the goods, nor an agreement to rescind the contract. That, on the contrary, it imported that they did not choose to do any thing without the approbation of the creditors at large; and there was no assent of the creditors to the stoppage by the defendant.

It remains now to be shown, according to our proposed division of this subject, in what cases the right of stoppage *in transitu* may be defeated. In the pursuit of this inquiry, we shall have occasion to consider the nature and effect of an assignment of a bill of lading by a consignee.

The nature of the bill of lading has been already shown¹; but, as in the cases which will be cited hereafter, questions have arisen upon the form of the bills of lading, it will be proper here to advert to the different forms in common use. — Sometimes it is made for de-

livery to the consignor by name, or assigns; sometimes to order or assigns, not naming any person; and at other times to the consignee by name, or assigns. In the two first cases, the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person; or indorses it specially for delivery to a person named in the indorsement. It will be perceived that there is a great similarity between this instrument and a promissory note.¹ The mere possession of a promissory note made payable to another person, and not indorsed by him, gives the holder no power to endorse the note over. Nor ought the mere possession of a bill of lading, made for delivery to the consignor, and indorsed by him, to induce any one to believe that the holder is authorised to dispose of the goods. On the other hand, if the bill of lading be originally made for delivery to the consignee; or, being made for delivery to the consignor or assigns, or to order or assigns, be indorsed by the consignor, either to a person by name, or generally, without designating any person; in these cases, the consignee named in the bill of lading, and holding the bill of lading indorsed in blank, may, generally speaking, transfer his property to a third person. But to this rule there are exceptions, depending upon the situation and character in which such consignee or holder possesses the bill of lading, as will be pointed out hereafter. (a)

¹ Abbott on Merch. Shipp., p. 201.

(a) And where there are several bills of lading, of different imports, the person who first gets one of them by a legal title, from the owner or shipper, has a right to the consignment; and where,

Nothing is more common than for a person who has received a bill of lading, to sell the goods before their arrival, and deliver over the bill of lading to the vendee; a practice which commerce has given rise to amongst merchants; but it is not every mercantile practice of frequent use, and even of general convenience; that is, or ought to become, in all its consequences, a part of the law of the land; for if such rule were adopted, the law must in many cases dissent from its own principles, and vary with the varying fashions of the times; nevertheless, the law does adopt into its own bosom many of the ancient customs and usages of merchants, and stretch forth its arms to assert and maintain them, where they are found consonant to legal reason and evidence, and most especially when they are calculated to promote honesty and prevent fraud.¹

This practice of the consignee assigning bills of lading has given rise to a very important question, how far the right of the consignor is affected by such assignment made *bon. fide* for a valuable consideration; which question will depend (as is observed by Mr. Abbott) upon the extent of legal right, which the act of the consignee confers on his assignee. The principle that the consignee of a bill of lading might assign it, was first laid down in the case of *Evans v. Martell*²; and in the report in Lord Raymond, Shower is reported

¹ Abbott, Merch. Shipp. p. 367.

² Lord Raym. 271, 12 Mod. 256, and 3 Salk. 290. S. C.

though different upon the face of them, they are constructively the same, and the captain has acted *bon. fide*, a delivery according to such legal title will discharge him from them all. *Caldwell v. Ball*, 1 T. R. 206.

to have said, "That it had been adjudged so in the Exchequer." (b) And this principle seems to have been acquiesced in, in the case of *Appleby v. Pollock*¹, where it appeared that one Brand shipped certain goods at Leith, and consigned them to one Stratton in London. Stratton as soon as he received the bill of lading, by indorsement thereon assigned the goods to the plaintiff for one hundred and sixty pounds, and soon afterwards became a bankrupt. Brand, hearing of the bankruptcy, took process out of some court in Scotland, to attach the goods in the hands of Pollock, the master of the ship; but the ship having left Leith, the process was executed at sea. Upon the arrival of the ship at London, the master refused to deliver the goods to the plaintiff Appleby, unless he would indemnify him against the process in Scotland. And thereupon Appleby brought an action against Pollock to recover the value of the goods. At the trial of the cause before Lee, Chief Justice, at Guildhall, he declared himself of opinion, that the assignment gave the plaintiff a sufficient property to maintain the action, if, under the circumstances, he was entitled so to do. As to the effect of the attachment, parol evidence was given, that by

¹ Cited from MS. notes, Abbott, 568.

(b) In one case at Nisi Prius, where merchants in London had received a bill of lading from a stranger, in a letter requesting them to insure the goods, but declining to transact business for the consignor, and acting *bond fide* for his interest, had indorsed the bill of lading to a friend of his, who received the goods, and afterwards failed with the proceeds in his hands; it was held, that the merchants, by indorsing the bill of lading, had made themselves liable to the consignor for the price of the goods. *Corlett v. Gordon*, 3 Camp, 472,

the law of Scotland, if goods are arrested the holder must give security not to part with them, and the defendant relied on the process, by which these goods were attached: to which the Chief Justice said, "if the process could have attached these goods, it could only have done so within the jurisdiction of the Court, and it does not appear that the place where the goods were attached, was within the jurisdiction of the Court; and it lay upon the defendant to make that out:" and the Chief Justice, therefore, directed the Jury to find a verdict for the plaintiff. In the case of *Caldwell v. Ball*¹, it is said, that a bill of lading is assignable in its nature; and by indorsement the property is vested in the assignee; in this latter case, however, the effects of the assignment, as to the consignor's right to stop *in transitu*, was not decided; but the law is now settled, that an assignment of a bill of lading by the consignee, for a valuable consideration, where the transaction is *bona fide*, and the assignee has no notice that the goods are not paid for, is a complete transfer of the property, and divests the right of the assignor to stop the goods *in transitu*. (c) This will be seen by the following case: Trover for a cargo of corn.² The plaintiff gave in evidence that Turing and Son, merchants at Middle-

¹ 1 T. R. 216.

² *Lickbarrow v. Mason*, 2 T. R. 63.

(c) But it has been held, that a party is not deprived of his right to stop goods *in transitu*, because his factor, who was only employed to sell the goods, has *pledged* the bill of lading. *Newsome v. Thornton*, 6 East, 17.

And by the statute 6 Geo. IV. c. 94., persons who take goods in pledge from agents, shall acquire no greater interest in the goods than the agents themselves possessed at the time of the pledge; and the true owners are entitled to the restoration of the goods, upon repayment of the advances.

burgh, in the province of Zealand, on the 22d of July, 1786, shipped the goods in question on board the *Endeavour*, for Liverpool, by the order and directions, and on the account of Freeman, of Rotterdam. That Holmes, as master of the ship, signed four several bills of lading for the goods, in the usual forms, *unto order or to assigns*, two of which were indorsed by Turing and Son, *in blank*, and sent on the 22d of July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son, and the remaining one was kept by Holmes. On the 25th of July, 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to four hundred and seventy-seven pounds, in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th of July, 1786, Freeman sent to the plaintiffs the two bills of lading, together with the invoice which he had received from Turing and Son, in the same state in which he received them, in order that the goods might be taken possession of, and sold by them on Freeman's account; and on the same day, Freeman drew three sets of bills of exchange to the amount of five hundred and twenty pounds on the plaintiffs, who accepted and afterwards duly paid them. The plaintiffs were creditors of Freeman to the amount of five hundred and forty-two pounds. On the 15th of August, 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became a bankrupt; those bills were regularly protested, and Turing and Son were afterwards obliged as drawers to pay them. The price of the goods so shipped by Turing and Son was wholly unpaid. Turing and Son hearing of Freeman's bankruptcy, on the 21st

of August, 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them with an invoice of the goods, authorising them to obtain possession of the goods, on account of and for the use and benefit of Turing and Son, which the defendants received on the 28th of August, 1786. On the arrival of the vessel with the goods at Liverpool, on the 28th of August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, and he thereupon delivered them, and the defendants took possession of them for and on account of Turing and Son. The defendants sold the goods on the account of Turing and Son, the proceeds whereof amounted to five hundred and fifty-seven pounds. Before the bringing of the action the plaintiffs demanded the goods of the defendants, and tendered them the freight and charges; but neither the plaintiffs, nor Freeman, had paid or offered to pay the defendants for the goods. To this evidence, the defendants demurred, and the plaintiffs joined in demurrer. After two arguments, the Court held that the indorsement of the bill of lading in this case transferred the property to the assignee, and completely divested the right of the consignor to stop *in transitu*. And it was laid down as a general principle, that wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. And here the consignor having indorsed the bill of lading in blank, he enabled the consignee to transfer it, and could not retain the goods, after they had passed into the hands of an innocent assignee; and accordingly they gave judgment for the plaintiff. This judgment was afterwards reversed on a writ of error in the Ex-

chequer Chamber¹, and a second writ of error having been brought in the House of Lords, a *venire de novo* was awarded.² The cause was accordingly tried again, when a special verdict was found, stating amongst other things, "that by the custom of merchants, bills of lading, expressing goods or merchandizes to have been shipped by any person or persons to be delivered to order or assigns, have been and are, at any time after such goods have been shipped, and before the voyage performed for which they have been and are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her, or their name or names, and delivering or transferring the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods hath been and is transferred and passed to such other person or persons: and that indorsements of bills of lading in blank, that is to say, by the shipper or shippers with their names only, have been, and are and may be filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading, to be made to such person or persons. And that the same, when filled up, have the same operation and effect, as if the same had been made or done by such shipper or shippers, where he, she, or they, indorsed the same bills of lading with their names as aforesaid."³

The Court, understanding that it was intended that this should again be carried up to the House of Lords,

¹ 1 H. Black, 357.

² 2 H. Black, 211, 5 T.R. 367.

³ 5 T.R. 685, and see 1 B. & P. 564.

declined entering into a discussion of it, merely saying, that they still retained the opinion delivered in the former case; and they accordingly gave judgment for the plaintiffs.

A writ of error was afterwards brought, but subsequently abandoned, and the judgment acquiesced in.

So, if the transaction be *bona fide*, the property of the goods passes to the assignee of the consignee for a valuable consideration, although such assignee knew at the time, that the consignor had not received payment in money for his goods, but had taken the consignee's acceptance, payable at a future day, not then arrived; and, by such assignment the consignor's right to stop *in transitu* is defeated.

Trover for a quantity of Madeira wine and brandy.¹ The wine and brandy in question was consigned by Philip Jean, of Jersey, to Edward Main, in London, and was shipped on board the *Britannia*, of which the defendant was master. The plaintiff claimed as assignee of a bill of lading, whereby it was to be delivered "unto Edward Main, or to his assigns, he or they paying freight, &c." The invoice of the wines, which stated that it had been bought for account of E. Main, of London, was transmitted to Main by Jean, in a letter of the 31st of December, 1806. Jean transmitted the bill of lading for the same. At the foot of the invoice was written, "Payable in bill on London, at three months from the 20th of December," (1806), and marked with Main's initials. The bill of lading bore date the 14th of February, 1807. Jean drew a bill on Main for the value of these goods, dated the 20th of December, 1806, at three months, which bill, due the 23d of March, 1807, was accepted by Main; and, on

¹ *Cuning v. Brown*, 9 East, 506, 1 Camp. 104. S. C.

the 28d. of February, 1807, Main indorsed the bill of lading in question to the plaintiff, for a full and valuable consideration, and absconded about April, and was not afterwards heard of, leaving his acceptance unpaid. The goods arrived in London about the beginning of June, and were demanded by the plaintiff of the defendant, who refused to deliver them, having been indemnified by the agent of Jean, who, on notice of the absconding and insolvency of Main, claimed to stop them *in transitu*. On the part of the defendant, the answer of the plaintiff to the bill in Chancery filed by Browne and Jean, was read, whereby the consideration for the indorsement appeared, and also that at the time of the indorsement, the plaintiff had no knowledge that Main had stopped payment, or was unable to pay his debts; and that he had no suspicion of his insolvency, and that “the plaintiff believed at the time that the pipes of wine in question had been sold to and purchased by Main, in the course of trade; and that, although the plaintiff was aware that they had not then been actually paid for by Main, or by any other person, yet he concluded that the same would be paid for, or credit given to Jean, by Main, in the course of their business together;” and he negatived the charge of collusion. The question was whether the indorsement of the bill of lading in this case passed the property of the goods, the plaintiff having notice that the goods had not been paid for in money, such indorsement being made *bond fide*, for valuable consideration, and without notice of any circumstance, which, in fairness, ought to have prevented the plaintiff from taking it (unless notice that the goods had not been paid for in money, be such circumstance)?

The Court observing that the doubt which had been thrown on this subject, arose principally from the words, "*without notice*," which are to be found in the case of *Salomons v. Nissen*, and other cases on this subject, thought that, according to the general scope and meaning of the passages in the opinions of the judges, where this expression occurs, it is not to be understood in the restrained sense which had been contended for; viz. "*without notice that the goods had not been paid for*," but "*without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable*." And so understanding such expression, or, at any rate, so understanding the rule of law on the subject, they held that, in this case, no circumstance appeared to have existed at the time of the assignment of this bill of lading which ought to have prevented the plaintiff from taking it, or which ought to render it unavailable in his hands.

But if any *indicia* of fraud, or any circumstance which shows that the indorsee ought not in fairness to have taken the indorsement, appear, the title of such indorsee under the bill of lading is defeated, as between him and the consignor, who, in such cases, may exercise the right of stoppage *in transitu*. (d) Thus, in *trover* by the assignees of Scott, a bankrupt¹, for a quantity of wheat and beans. It appeared that Fortaine, a merchant in London, on the 4th of June, 1766,

¹ *Wright v. Campbell*, 4 Bur. 2046. 1 W. Black. 628, S. C.

(d) A bill of lading given before the goods are put on board the ship is fraudulent, and the indorsement of it will convey no property in the goods, even to a *bond fide* indorsee. *Osey v. Gardner*, Holt. 405.

shipped the goods in question on board the *Two Friends*, for Liverpool, and took bills of lading for the same, deliverable "unto order or to assigns;" and afterwards, on the same day, indorsed one of the bills of lading to "Mr. Richard Swanwick, or order," and transmitted the same, so indorsed, to Swanwick. That on the 2d of July following, Swanwick being arrested for the sum of four hundred pounds, applied to Scott (who was also a merchant in Liverpool, and with whom Swanwick had had dealings, and was then indebted to him in the sum of eight hundred pounds), to become bail for him, which Scott refused to do, unless Swanwick would indemnify him, and also secure his debt. Upon this Swanwick produced the bill of lading which he had received, indorsed by Fontaine, and offered to indorse it to Scott, assuring him that the goods comprised in it were his own property. This was agreed to, and Scott became bail accordingly, and the bill of lading was indorsed to him. Subsequent to this transaction, Fontaine applied to Scott, and informed him of the real fact, that Swanwick was only a factor, and not the proprietor of the goods; and he accordingly claimed the goods, which Scott refused to deliver up. Scott and Swanwick soon after both became bankrupts. The defendants claimed under an indorsement of one of the other bills of lading from Fontaine. It being suggested that there was a fraudulent collusion between Scott and Swanwick, the material question was—whether this was a fair transaction between Swanwick and Scott, for a valuable consideration, and without notice, or a trick and contrivance between them to cheat an honest owner out of his property?—in which latter case it was agreed that the claim of Scott could not be supported;

but the case being imperfectly stated as to that fact, a new trial was ordered.

So, in trover for seven hundred and five pigs of lead¹, the case was ; that Edward Hague bought the lead of the defendant, in Liverpool, and ordered it to be shipped to Rouen in France. The lead was of the value of one thousand pounds. The said lead was accordingly shipped on the 10th of March, 1787, at Chester, on board the Jane ; and the bill of lading was indorsed by the defendants in blank, and sent to Hague. On the 16th of March, 1787, the plaintiff gave Hague his acceptance for seven hundred pounds, upon which Hague delivered the bill of lading to him. These acceptances were paid by the plaintiff when due. On the 21st of March, 1787, the plaintiff and Hague entered into an agreement that the plaintiff should pay the consignor for the lead ; and that the money should be remitted to him for which the consignee might sell the lead. And that the profit or loss of the cargo should be divided between Hague and the plaintiff. The vessel sailed with the lead for Rouen, in March, 1787, but was forced back, by stress of weather, to Chester ; and Hague having become bankrupt, and the defendants not having been paid the price of the goods, they, on that account, on or about the 5th of April, stopped the goods while they were on board the ship in England, and took them away. The plaintiff afterwards demanded them, but the defendants refused to deliver them ; upon which the action was brought : but the Court held, that it appearing, upon the face of the agreement, that the goods had not been paid for, the plaintiff could not be considered as a *'bond' fide* purchaser, *without* notice ;

¹ *Salomons v. Nuten*, 2 T.R. 674.

and, also, that it appearing by the agreement that the plaintiff and Hague were partners, *quoad* this transaction, the plaintiff could not recover; accordingly, there was judgment for the defendants.

If a bill of lading be made to order or assigns, the indorsement of the shipper is necessary to give it negotiability; and, therefore, where one Fox¹, a wine-merchant, in London, having ordered five pipes of wine from Messrs. Abbot and Co., of Oporto, they loaded them on board a vessel bound for London, and took bills of lading for delivery to order or assigns. One of the bills they transmitted to Fox, in a letter, wherein they said they had shipped the wine *on his account*, had sent him a bill of lading, and had drawn upon him for the price. Fox accepted the bill of exchange which was payable nine months after date. Before the bill became due the wine arrived, and Fox not being able to pay the duties, it was sent to the king's warehouse, under statute 26 Geo. III. c. 59. While it remained there, Fox being indebted to Mary Nix, and called upon for payment, and unable to pay, sold the wine to her for forty pounds, then paid to him, and the amount of his debt. He became bankrupt soon afterwards, and the agents of the consignors having paid the duties, and obtained the goods, Mrs. Nix brought an action against them for the value. The cause was tried before Lord Ellenborough; and it was insisted on behalf of the plaintiff, that there was no difference between the indorsement of a bill of lading by the consignor, and the sending it inclosed in a letter of this import. But his Lordship declared himself to be of a different opinion, and held, that the right of the

¹ Nix v. Olive, Guildhall sittings, before Lord Ellenborough Ch.J., after

T.R. 1805. cited in Abbott on Merch. Shipp. p. 377

consignor to stop the goods was not divested under these circumstances. (e)

There may, however, exist special circumstances which will be considered tantamount to an indorsement if done *bond fide*, by a person having competent authority. As, where Thompson and Co., of Newry¹, had consigned a quantity of beef to Eustace and Holland, their factors in London, for the purpose of being sold, but sent the bill of lading without indorsement; Eustace and Holland wrote to Thompson and Co. for an indorsement of the bill of lading, to which they answered, that if the bill of lading was not indorsed, it was 'a mistake, and that they would send an indorsement, upon which Eustace and Holland sold the provisions to Boehm and Taylor.

Thompson and Co. had drawn bills on Eustace and Holland, and they not being able to pay them when they became due, the plaintiff paid them for the honour of Thompson and Co., the drawers, of whom he was in other respects a creditor; and having knowledge of all the above mentioned transactions, he wrote to Thompson and Co. for an indorsement of the bill of lading, which they sent him. He then demanded the provisions

¹ *Dick v. Lumsden, Peake, 188.*

(e) Where the purchaser of goods to be paid for by his own acceptance, before the bill became due, and whilst the goods were *in transitu*, sold them for a valuable consideration, but without indorsing the bill of lading; it was held that his title was completed by accepting the bill, and that the sale by him defeated the vendor's title to stop *in transitu*. [*Davis v. Reynolds, 4 Camp. 268.*]

And generally, where goods are paid for by an acceptance, they cannot be stopped by the vendor until the bill is dishonoured. *Davis v. Reynolds, 1 Stark. 115.*

of the defendant, the master of the ship, but Boehm and Taylor having indemnified him, he delivered the provisions to them. And an action of trover being brought, it was held by Lord Kenyon, before whom the cause was tried, that the plaintiff knowing all the circumstances of the case, could not by any subsequent act of his own, take the goods out of possession of Boehm and Taylor. Though between persons ignorant of the transactions, an indorsement is the only transfer, yet, where the parties know the whole circumstances, a letter of this kind is a sufficient transfer. The bills were not drawn precisely for these goods, but on the general account. Here the factor transferred the property, and having a competent authority so to do, it was not essentially necessary that he should have the possession of the goods, or an indorsement of the bill of lading. (f)

(f) And the property in a cargo, for which the master of a ship has signed bills of lading, may be transferred by delivery, without indorsement of the bills of lading; and the transfer will be good against all the world, except subsequent indorsees of the bills of lading for a valuable consideration. *Nathans v. Giles*, 1 Marsh. 226.

And in a case where a party abroad had delivered to the captain of the plaintiff's ship, and on board that ship, a cargo, stating it to be on the plaintiff's account, as his own goods, and to be delivered to him; it was held that the property absolutely vested in the plaintiff, although the party abroad sent bills of lading indorsed in blank to his agent in England, with instructions, that if the plaintiff did not accept his bills of exchange for the produce of a part of the cargo, the bills of lading should be indorsed to the payees of the bills of exchange, which was accordingly done. *Ogle v. Atkinson*, 1 Marsh. 328.

SECT. III.

Of Sales contracted under the directions of particular Statutes. (g)

The first object which demands our attention under this head, is the transfer of property in British ships.

Since England first began to appreciate the advantages which her insular situation afforded her for commercial pursuits ; since the eyes of her legislators were first opened to the true interests of the country, and the dominion of the seas became her object ; it has always been the policy of government, by conferring peculiar privileges and immunities on the ships of our own country, to encourage that spirit of maritime adventure, which, at the same time that it enriches the country, by extending her commerce, forms a nursery for seamen to man those fleets which defend her shores. It is from a perseverance in this sound policy, that while the fleets of England ride triumphant in the most distant corners of the globe, her ports have become the emporium of the universe.

(g) As the law relating to the sale of merchant shipping has been so materially altered since the period at which this work was written, there was no other way of treating the subject in this section with any degree of perspicuity, than writing the whole section over again : this has accordingly been done, and at the end of the chapter another section added on sales by auction.

In order effectually to confine such privileges to British ships only, it became necessary that there should be some public record whereby the ownership of British vessels might be known at all times: accordingly we find that the efforts of the legislature have at various times been employed in providing for a general registry of shipping.¹ But this important branch of our maritime law, was not perfectly established as a system until the passing of the statute 26 Geo. III. c. 60., an act for which the country is indebted to the exertions of the late Earl of Liverpool, than whom no one was better acquainted with the commercial interests of this country.

A minute detail of the several legislative provisions respecting the registry of ships does not fall within the scope of this work, which is confined to the *transfer* of property only; as, however, a succinct account of the law on this subject, as it now stands, is absolutely necessary to the right understanding of this section, it is here given.

By the new consolidated ship's registry act, 4 Geo. IV. c. 41. (*h*), which specially repeals the 7 & 8 W. III. c. 22., 15 Geo. II. c. 31., 26 Geo. III. c. 60., 27 Geo. III.

¹ 12 Car. II. c. 18. — 7 & 8 W. III. c. 22. — 15 Geo. II. c. 31. — 26 Geo. III. c. 60. — 27 Geo. III. c. 19. — 28 Geo. III. c. 24. — 54 Geo. III. c. 68. — 48 Geo. III. c. 70. — 49 Geo. III. c. 41. — 55 Geo. III. c. 116. — 59 Geo. III. c. 5. — 1 Geo. IV. c. 9. — 4 Geo. IV. c. 41. and 6 Geo. IV. c. 110.

(*h*) Although this is the statute regulating the registry of ships which is now in force, it seems that it has been virtually repealed from a certain time by the general custom-house act, 6 Geo. IV. c. 105. But by another general ship's registry act, 6 Geo. IV. c. 110., which is to take effect and be law from the 5th of January, 1806, the whole of the provisions in the statute of the 4 Geo. IV. c. 41. have been re-enacted without any alteration, except by the addition of two new clauses tending to prevent the ill effects arising from a

c. 19., 34 Geo. III. c. 68., and all other statutes relating to the registry of ships, it is enacted, § 2. "That no ship or vessel having a deck, or being of the burthen of fifteen tons or upwards, shall be entitled to any of the privileges of a British ship, until the person or persons claiming property therein, shall have caused the same to be registered, and shall have obtained a certificate of such registry from the person authorized to make such registry, and grant such certificate: Provided, that nothing shall extend to require any vessel not exceeding the burthen of thirty tons, and not having a whole or a fixed deck, and being employed solely in the fishery on the banks or shores of Newfoundland, and of the parts adjacent, or on the banks or shores of the provinces of Quebec, Nova Scotia, or New Brunswick, adjacent to the Gulf of St. Lawrence, and on the north of Cape Canso, or of the islands within the same, or in trading coastwise within the said limits, to be registered, so long as such vessel shall be solely so employed."

Sect. 5. enacts, "That no ship or vessel shall be registered, or having been registered shall be deemed to be duly registered, except such as are wholly of the built of the United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to his Majesty at the time of the building of such ships or vessels; or such ship or vessel

combination for the increase of wages amongst the working shipwrights. So that although in this section, the statute referred to is that of the 4 Geo. 4. c. 41: as being the law at the present moment, the quotations and references will equally apply to the new statute of the 6 Geo. IV. c. 110.

as shall have been condemned as prize of war, or for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong, and continue only to belong to His Majesty's subjects duly entitled to be owners of registered ships or vessels."

And by section 9 & 10. it is enacted, "That ships are in general to be registered at the port to which they belong, which is that at or near which some or one of the subscribing owners shall reside."

And by section 11. it is enacted, "That no person who has taken the oath of allegiance to any foreign state, except under the terms of some capitulation, except he shall afterwards become a denizen or naturalized subject of the United Kingdom, by His Majesty's letters patent, or by act of Parliament, nor any person usually residing in any country not under the dominion of His Majesty, his heirs or successors, unless he be a member of some British factory, or agent for, or partner in any house or co-partnership actually carrying on trade in Great Britain or Ireland, shall be entitled to be the owner, in whole or in part, directly or indirectly, of any ship or vessel required and authorized to be registered." It has been held¹, upon the statute 26 Geo. III., that a person who is continually changing his residence, so as not to have in the common acceptance of the term his usual residence here, does not come within the description of persons meant by the statute. This difficulty is now in a great measure obviated by the present law, declaring, that "no person who has taken the oath of allegiance, &c." shall be the owner of a British ship. Although the present provision that no person usually residing in any foreign

¹ 1 Edw. 148.

country shall be an owner, except he be a member of some British factory abroad, may create some little difficulty as to the domicile; the ease with which the persons may be ascertained to whom the right of ownership in British vessels is restricted, is much increased.

As to the transfer of property in British ships, it is enacted by section 29. "That when and so often as the property in any ship or vessel, or any part thereof, belonging to any of His Majesty's subjects, shall after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, of the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity; provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel therein intended, be effectually proved thereby."

But the statute does not extend to a bill of sale from the original builder to the first purchaser, which need not contain a recital of the certificate of registry; nor can it properly do so, because the ship is not required to be registered till she is out of the hands of the builder, although the owners must cause her to be registered before the commencement of a voyage; this point was decided in a case upon the old registry act, 34 Geo. III. c. 68.¹

Nor to the sale of lighters, barges, boats, and vessels

¹ *Oxenham v. Gibbs*, in B. R. T. T. 1807.

of any built or description whatever, which are used solely in inland navigation, or in rivers.¹

The latter clause of this section which enacts, that mere clerical mistakes in the recital of the certificate of registry, shall not vitiate a bill of sale, has obviated difficulties which arose upon the interpretation of the former acts; although, upon the principle of equity, such was held to be law before the enactment of this positive clause. And for the purpose of showing what have been considered by the courts to be mere clerical errors, it may be as well to give in a succinct manner the leading cases on the subject. Where a bill of sale, reciting the certificate, stated, "that the said ship or vessel was foreign built, formerly called the *Superb*, taken prize from the French King's subjects, by His Majesty's ship *Fortitude*, George Keppel, Esq. commander, and legally condemned in the High Court of Admiralty, as by sentence of condemnation dated the 28th May, 1783, and made free as by a certificate of freedom granted at London, the 28th January, 1783, appears," &c. And it appeared, that the date of the condemnation was on the 28th May, 1782, and the date of the certificate of freedom, the 28th January, 1783, in the collector's, comptroller's, and secretary's books at the custom-house, and in the certificate of registry itself; but, in the register-general's books, the date of the condemnation was in the 28th May, 1783; and that reference was had to that office for a copy of the certificate of the ship's register (the ship being then at sea), in order to fill up the bill of sale; and that either of the four offices was the proper office for such reference. The Court held, that it appearing in the recital that

¹ *Laroche v. Wakeman, Peake*, 141.

the certificate of freedom was dated in January, 1783, and the condemnation in May, 1783, it was impossible that it could be correct, inasmuch as the certificate of freedom would then bear date prior to the condemnation. It was, therefore, apparent on the face of the instrument itself, that some error must have crept into the copy of the certificate of registry, which was inserted in the bill of sale; and as it appeared that the parties had applied to the proper officer for the copy of the certificate entered in the public books there, which they had inserted in the bill of sale *verbatim et literatim* as it was there entered, not being able to have recourse to the original certificate, which was necessarily on board the ship then at sea, that they had taken every step they could to comply with the requisites of the statute; and that, therefore, the bill of sale was valid notwithstanding the mistake.¹

And where the parties had by mistake misrecited the certificate in a bill of sale, by stating Guernsey as the port where the certificate was granted, instead of Weymouth (which mistake was rectified when discovered, by the consent of all the parties, and the deed delivered *de novo*), the Court held that no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, and the defect arising not from intention, but from mistake, and the alteration merely making the contract what it was originally intended to have been.²

But where in the bill of sale conveying the share or moiety of one joint-owner to another, the certificate of registry was not accurately and truly recited, the word "*oath*" being used instead of *affirmation*, *sworn* instead

¹ *Rolleston v. Smith*, 4 T. R. 161.

² *Cole v. Parkin*, 12 East, 471.

of *affirmed*, the allegation that another part-owner was not resident within twenty miles being omitted, the name of the master changed, and the statement of her dimensions being in figures, and describing her breadth *above* the broadest part of the main wales, instead of the dimensions in words at full length, and her breadth *at* the broadest part of the main wales; the Court held, that the misrecital was fatal, and the bill of sale clearly void.¹ It might possibly be questionable whether such a misrecital would be fatal under the new act, 4 Geo. IV. c. 41.; but the criterion in such a case seems to be whether or not there be satisfactory proof the identity of the ship.

The indorsements on the certificate of registry need not be recited in a subsequent bill of sale of a ship, but it will be always prudent, although not essentially necessary, so to recite them. This point was decided in a case upon the construction of the 17th section of the 26 Geo. III. § 16., and it would seem that the 4 Geo. IV. c. 41. has made no alteration in this respect. — The case was this: Trover for the ship *Castor* and *Pollux*²: at the trial it appeared that the ship having been built in 1790, was transferred by the builders to the present defendant under the grand bill of sale, when a certificate of registry was attained by the defendant for himself as owner and master, and several voyages were performed in her by him as such; that in 1791, the defendant having had considerable dealings with Lempriere, a merchant in London, and being then indebted, and likely to become more so to him, assigned the *Castor* and *Pollux* by way of security, and delivered possession of the grand bill of sale; that in the deed of assign-

¹ *Westerdal v. Dale*, 7 T. R. 306. . . ² *Capadose v. Codnor*, 1 B. & P. 483.

ment, the certificate of registry of the ship was truly and accurately recited in words at length, pursuant to the directions of 26 Geo. III. c. 60. § 17.; that on the 8d April, 1792, Lempriere, in consequence of some transactions by which he became indebted to the plaintiff, executed to him an indenture, which after reciting the assignment from the defendant, and the debt due from him to Lempriere, as well as that from Lempriere to the plaintiff, assigned his interest in the ship to the latter, subject to redemption on payment of the money due on the 2nd July following; that in this deed the certificate was also truly set forth; that at the time of the assignment, the defendant was on a voyage with the ship, and acting as master; and that previous to his return, Lempriere having become bankrupt, he refused to deliver up the ship to the plaintiff. The objection taken at the trial to the plaintiff's recovery, was, that neither in the assignment to Lempriere, nor in that to the plaintiff, was there any recital of the indorsement of the change of property made on the certificate of registry; and the Court were of opinion that such recitals were not required to be made.

And if the requisite forms of registration are not complied with, the bill of sale will be so completely void that it will give no title either at law or in equity, however peculiar the circumstances of the case may be as between the parties themselves. This will be seen from the following cases: Where A., having contracted for a ship to be built for him in the East Indies, agreed during the time of its building to sell a share to B., who paid a part of the price in pursuance of the agreement; and afterwards, on the ship's arrival in England, A. caused her to be registered, and accounted with B. as part-owner, although his share was never on the re-

gister as such part-owner ; the Court held, that B. had no legal interest in the ship.¹ And again, where two partners purchased a ship under a bill of sale, conformably with the registry act, and afterwards took in two other partners, but there was no transfer of the ship to them jointly with the others, nor did their names appear in the registry as part-owners, it was held that the four partners not had an insurable interest in the freight, which would result from the right of ownership, to which the two new partners had neither a legal nor an equitable title.²

Before we proceed to show the regulations made for the sales of ships, it may be as well, in this place, as we have seen what persons may be the owners of British ships, to point out the rule of law as to the quantity of interest which may be possessed in any vessel. By the 30th section, then, "The property in every ship or vessel of which there are more than one owner, shall be taken and considered to be divided into sixty-four parts or shares ; and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares ; and no person shall be entitled to be registered as the owner of any ship or vessel, in respect of any proportion of such ship or vessel, which shall not be an integral sixty-fourth part or share of the same ;" and upon the first registry of all vessels, the subscribing owner must declare upon oath the number of such parts or shares then held by each owner, and the same shall be registered accordingly. And if the property of any owner cannot be reduced by division into any number of integral sixty-fourth parts or shares, the fractional parts which

¹ *Stringer v. Murray*, 2 B. & A. 248, ² *Camden v. Anderson*, 5 T. R. 769.

shall be over, above such number of integral sixty-fourth parts or shares may be transferred by memorandum upon the bills of sale, without such transfer being liable to any stamp-duty; and the right of such owners to such fractional parts, shall not be affected by reason of the same not having been registered. Mercantile partners, named and described in the registry, may hold any ship or vessel, or any share or shares thereof, in the name of the partnership as joint owners thereof, without distinguishing the proportionate interest of each of such owners; and any ship, or shares thereof so holden, shall be deemed in all respects as partnership property, and shall be governed by the same rules both in law and in equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.

By section 31., no greater number than thirty-two persons shall be entitled to be the legal owners at one and the same time of any ship or vessel, as tenants in common, or to be registered as such; but this is not to affect the equitable title of minors, heirs, legatees, creditors, or others exceeding that number, duly represented by, or holding from any of the persons within the said number, registered as legal owners of any share or shares of such ships or vessel. And where any number of persons have associated themselves as a joint stock company, for the purpose of owning any ship or ships as the joint property of the company, and have elected any number not less than three of themselves, to be trustees of the property in such ship or ships, such trustees or any three of them with the permission of the commissioners of His Majesty's customs, may register such ship or ships, stating the description of the company as the owners. And the ships of any corporate

body may be registered by the secretary or other proper officer, declaring the name and description of the corporation, instead of the names and descriptions of the owners of such ships.

Prior to the new act, 4 Geo. IV. c. 41., there was much confusion in the construction of the registry acts, with respect to the time when the indorsement of a transfer was to be made on the certificate of registry; for the statutes appointed distinct forms of proceeding, in the two cases, when the transfer was made when the ship was in the port to which she belonged, or when it was made when she was absent at sea; and consequently there are many decisions to be found in the books upon the subject. But as the new law has removed all difficulty in such cases, and laid down a plain and simple mode of proceeding with respect to all vessels, in whatsoever condition they may be; these cases are now of little value, and it will, it is presumed, be sufficient to refer the curious reader to the places where they may be found.¹

The mode of proceeding, then, to be adopted under the new law, for the purpose of rendering effectual a bill of sale, is contained in the following sections, which, as they are the most important with regard to the subject now under discussion, will be given at length.

By section 35. it is enacted, "That no bill of sale or other instrument in writing, shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of

¹ *Moss v. Charnock*, 2 East, 400. *Heath v. Hubbard*, 4 East, 110. *Blossham v. Hubbard*, 5 East, 407. *Moss v. Mills*, 6 East, 144. *Hayton v. Jackson*, 8 East, 511. *Atkinson v. Maling*, 2 T. R. 462. *Mostaer v.*

Gillespie, 11 Ves. jun. 657. *Hubbard v. Johnstone*, 3 Taunt. 207. *Palmer v. Moren*, 2 M. & S. 43. *Hodgson v. Broun*, 2 B. & A. 427. *Richardson v. Campbell*, 5 B. & A. 196.

sale or other instrument in writing shall have been produced to the collector and comptroller of the port to which such ship or vessel belongs, and until the collector and comptroller shall have entered in the book of registry of such ship or vessel, and which they are required to do upon the production of the bill of sale, or other instrument for that purpose, the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and further, the said collector and comptroller shall, and they are required to indorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following; *videlicet*:

‘ Custom-House [*port and date, name, residence, and description of vendor or mortgagor*] was transferred ‘ by [*bill of sale or other instrument*] dated [*date ; number of shares*] to [*name, residence, and description of purchaser or mortgagee.*]

‘ A. B. Collector.

‘ C. D. Comptroller.’

And forthwith to give notice thereof to the commissioners of customs: and in case the collector and comptroller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, they are required to certify by indorsement upon the said bill of sale or other instrument, that the particulars before mentioned have been so entered in

the book of registry, and indorsed upon the certificate of registry as aforesaid."

The indorsement directed by the statute to be made upon the certificate of registry, must be made upon a certificate which is valid and in force at the time. This may be collected from a case decided upon the 34 Geo. III. c. 68. § 15., where it was held, that an indorsement made upon the certificate of registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after the certificate had been delivered up and cancelled, and had remained dormant all the intermediate time, did not convey a title; and the Court said, that the object in requiring an indorsement in the certificate, is in order to notify the change of property to the public; and that therefore such indorsement must be made upon an existing acknowledged certificate in use at the time. ¹

Section 36. enacts, "That when and so soon as the particulars of any bill of sale or other instrument, by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel in manner hereinafter mentioned."

Section 37. enacts, "That when and after the particulars of any bill of sale or other instrument, by

¹ *Moss v. Mills*, 6 East, 144.

which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry; or, in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged; and in case the particulars of two or more such bills of sale or other instruments as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property, in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are required to indorse upon the certificate of registry of such ship or vessel, the par-

particulars of that bill of sale or other instrument under which the person or persons claims or claim property, who shall produce the certificate of registry for that purpose, within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid: and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller, and they are required to indorse upon the certificate of registry the particulars of the bill of sale or other instrument, to such person or persons as shall first produce the certificate of registry for that purpose, it being the meaning of the act, that the several purchasers and mortgagees, of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: Provided always, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot, in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of His Majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry,

or for the registry *de novo* of the said ship or vessel, under the provisions of the act; and thereupon the collector and comptroller shall make a memorandum in the book of registers of the further time so granted; and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel; or the same share or shares thereof."

By section 38. it is enacted, "That if the certificate of registry of such ship or vessel shall be produced to the collector and comptroller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and comptroller of such port, as before directed, it shall be lawful for the collector and comptroller of such other port, to indorse on such certificate of registry, being required so to do, the transfer mentioned in such bill of sale; and such collector and comptroller shall give notice thereof to the collector and comptroller of the port to which such ship or vessel belongs, who shall record the same, in like manner as if they had made such indorsement themselves, but inserting the name of the port at which such indorsement was made; provided always, that the collector and comptroller of such other port shall first give notice to the collector and comptroller of the port to which such ship or vessel belongs, of such requisition made to them to indorse the certificate of registry; and the collector and comptroller of the port to which such ship or vessel belongs, shall thereupon send information to the collector and comptroller of such other port, whether any and what other bill or bills of sale have been recorded in the book of the registry of such ship or vessel; and the collector and

comptroller of such other port, having such information, shall proceed in manner directed by the act, in all respects, to the indorsing of the certificate of registry, as they would do if such port were the port to which such vessel belonged."

Section 39. enacts, " That if it shall become necessary to register any ship or vessel *de novo*, and any share or shares of such ship or vessel shall have been sold since she was last registered, and the transfer of such share or shares shall not have been recorded and indorsed, in manner herein-before directed, [the bill of sale thereof shall be produced to the collector and comptroller of His Majesty's customs, who are to make registry of such ship or vessel, otherwise such sale shall not be noticed in such registry *de novo*, except as hereinafter excepted; provided always, that upon the future production of such bill of sale, and of the existing certificate of registry, such transfer shall and may be recorded and indorsed, as well after such registry *de novo* as before."

And by section 42. it is enacted, " That if the ship or vessel, or the share or shares of any owner thereof, who may be out of the kingdom, shall be sold in his absence by his known agent or correspondent, under his directions, either expressed or implied, and acting for his interest in that behalf; and such agent or correspondent who shall have executed a bill of sale to the purchaser of the whole of such ship or vessel, or of any share or shares thereof, shall not have received a legal power to execute the same, it shall be lawful for the commissioners of His Majesty's customs, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry *de novo* be necessary, or to

be recorded and indorsed, as the case may be, in manner directed by the act, as if such legal power had been produced; and if it shall happen that any bill of sale cannot be produced, or if, by reason of distance of time, or the absence or death of parties concerned, it cannot be proved that a bill of sale for any share or shares in any ship or vessel had been executed, and registry *de novo* of such ship or vessel shall have become necessary, it shall be lawful for the commissioners of His Majesty's customs, upon proof to their satisfaction of the fair dealings of the parties, to permit such ship or vessel to be registered *de novo*, in like manner as if a bill of sale for the transfer of such share or shares had been produced; provided always, that in any of the cases herein mentioned, good and sufficient security shall be given to produce a legal power, or bill of sale, within a reasonable time, or to abide the future claims of the absent owner, his heirs and successors, as the case may be; and, at the future request of the party whose property has been so transferred, without the production of a bill of sale from him, or from his lawful attorney, such bond shall be available for the protection of his interest, in addition to any powers or rights which he may have, in law or equity, against the ship or vessel, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained by him."

These are the enactments which contain the requisites to be performed, in order to give effect to a sale of this species of property. It will have been observed that there are also certain acts to be done by the public officers of the custom-house; but the act is only *directory* on such officers, the vacating provisions being confined to such acts only as are required to be

done by the immediate *parties* to the sale or transfer; and not extending to the acts or omissions of strangers; and, consequently, any neglect of duty on the part of officers will not render a sale void. Such was the interpretation put by the Courts upon the old register acts; and there is no doubt that the same would be considered law under the new act.¹

It was held under the old register acts, and the same will be law at this time, that their regulations only applied to voluntary contracts between party and party, but not to transfers which are made by the act of the law, independent of the immediate will of the parties. Thus, assignments by commissioners of bankrupts to the assignees under the bankrupt laws², and titles passing to executors and administrators in case of death, are not that species of transfer, the regulation of which was in the contemplation of the legislature; and Lord Ellenborough, in delivering the judgment of the Court, expressed himself upon this point to the following effect: — “As to the objection, that the plaintiffs, as assignees, ought to have derived title to themselves by a compliance with the requisites of the registry acts in respect of the transfer of property in ships, it is an objection which, if it could prevail, would have the effect of defeating every title which has hitherto been made under a commission of bankrupt to this species of property, since the passing of the statutes. For I believe that in no instance the requisites of those statutes will be found to have been complied with, in regard to assignments by commissioners of bankrupt. But there is no ground for this ob-

¹ *Ratchford v. Meadows*, 3 Esp. 69. *Heath v. Hubbard*, 4 East, 110. *Bloxham v. Hubbard*, 5 East, 407. Under-

wood v. Miller, 1 Taunt. 387. *Hubbard v. Johnstone*, 5 Taunt. 177.

² *Bloxham v. Hubbard*, 5 East, 407. sed vide 4 Geo. IV. c. 41.

jection ; these statutes only relate to transfers made by the act of the parties, viz. from a *former owner* to a *new owner* ; and where the transfer is capable of being effectuated in the ordinary way, by the mere operation of an instrument of assignment from one party to the other, and do not relate to transfers deriving their effect by *peculiar provision or operation of law*, as assignments by commissioners of bankrupt to assignees under the bankrupt laws do. There the commissioners are not *former owners* ; they do not *sell* in the sense in which the word “ sale ” is used in the registry acts ; although, in pursuance of the directions of the bankrupt statutes, they *make sale thereof* in point of form, by deed indented and enrolled, &c., as being the means specially appointed and described by those statutes, for the execution of the power given to the commissioners in this respect, for the vesting of such property of the bankrupt in his assignees accordingly. The property transferred by them is neither legally nor equitably *theirs* ; it does not vest in them for an instant ; it passes by them, or rather, by the act they are directed and empowered to perform, *through* them. It appears, therefore, to us, that the assignments made by the commissioners of bankrupt to the assignees of the bankrupt, were not meant by the legislature to be comprehended in the provisions directed to be pursued, in respect of the transfer of property in ships, between sellers and buyers.”

But the registry regulations were not confined to the transfer of property to a stranger, but applied also to the transfer by one part owner to another. Thus, in one case it was held, that where such a transfer was made whilst a ship was at sea, and the provisions were not complied with within the limited

time after her return, the assignees of the party making it, who had become a bankrupt, were entitled in a Court of Equity to have an account of the voyage of the other part-owner.¹

The registry acts do not extend to an assignment of the freight alone; nor would they make void such an assignment, although contained in the same instrument as a transfer of the ship itself; which, so far as relates to the ship, is void for want of compliance with the regulations in the registry acts; for the interest in the ship may be in one, and the interest in the freight in another; and although an instrument transferring the former may be void, by neglect of the proper forms prescribed by the acts, a contract for, or an assignment of, the latter might be valid, and capable of being enforced at law or in equity.² But where A. B. and C. agreed to purchase a ship, and that it should be registered in the names of A. and B. only, but that the profits of the ship should be divided amongst the three, and C. filed a bill against A. and B. for an account of the freight and earnings of the ship; on a general demurrer, the Vice-Chancellor held that the agreement was illegal, as being contrary to public policy, and a stipulation contrived for the purpose of evading the provisions of the registry acts.³

The registry act 4 Geo. IV. c. 41. is expressly excepted in the operation of the 72d section of the new bankrupt act, 6 Geo. IV. c. 16., relating to goods in the order or disposition of the bankrupt.

Where a transfer of a ship has been made, it is of importance for the vendee to see that all the regulations

¹ *Speldt v. Lechmere*, 15 Ves. jun. 588.

² *Ibid.*

³ *Battersby v. Smith*, 5 Madd. 114.

of the register act have been complied with ; for where they have not been strictly attended to, no property, either legal or equitable, passes to the vendee. On this subject it may not be amiss to lay before the reader the opinion of Mr. Justice Lawrence, in delivering the opinion of himself and Le Blanc J., in a case¹ which was decided upon the statute 84 Geo. III. He says, " that the public will be most effectually served by holding that no interest shall pass from any owner in British ships to any other, until the public has that information which is so essential to its commercial welfare."

A sale of a share in a ship, or the sale of a ship at sea, is not within the statute of frauds, and is good without actual delivery, if the formalities of the register acts have been complied with.²

As it was the intention of the legislature in passing the registry acts to form a public record of the property in British ships, so such registry is, in all cases, conclusive evidence to negative the fact of ownership³ in any other party than those who are named in the registry. But it is in no case a positive proof of ownership⁴, either for a party who claims an interest in the vessel, or for the purpose of charging a man as a part-owner, and thereby rendering him liable for the repairs and other charges of the ship ; unless at the same time it be shown, that the registry was made with his privity and consent⁵, either by proof that he made the necessary affidavit to procure the registry⁶, or that he afterwards assented to such registry and adopted it.⁷

¹ *Moss v. Charnock*, 2 East, 599.

² *Addis v. Baker*, 1 Anst. 222.

³ *Camden v. Anderson*, 5 T. R. 709.

⁴ *Tinkler v. Walpole*, 14 East, 226.

⁵ *Fraser v. Hopkins*, 2 Taunt. 5.

⁶ *Cooper v. South*, 4 Taunt. 802.

⁷ *Smith v. Fuge*, 3 Camp. 456.

And now by the 41st section of the statute 4 Geo. IV, c. 41., copies of the affidavits made to procure registry, or of the entries in the registry books, are sufficient evidence, without the production of the originals, or the testimony or attendance of the officer in whose custody they are, if such copies be proved to have been examined and to be correct; and the registering officers must allow, upon a reasonable request, all persons whomsoever to take copies or make extracts from the original affidavits, or entries in the register books.

There are also other articles the sale of which is regulated by statute, either as to the place of sale, or mode of selling. Of the first description, are woollen and linen-cloths; it being enacted by the 1 & 2 P. and M. c. 7. § 12., that no person living in the country, out of any city, borough, town-corporate, or market-town, "shall sell *by retail* any woollen-cloth, linen-cloth, haberdashery-ware, grocery-wares, mercery-wares, at or within any city, borough, town-corporate, or market-town, or within the suburbs or limits thereof (*except it be in open fairs*) upon pain of forfeiting for each offence the sum of six shillings and eight pence, and the whole wares so sold or offered to be sold." By the third section, this act is declared not to extend to sales "by wholesale in gross, and not by retail." And the fifth section provides, that the act shall not hinder a person from selling by retail or otherwise all manner of cloth, linen or woollen, *of his own making*, in any city, &c. as freely as he might before the making of that act.

The act speaks of persons living in the country, and out of *any* city, borough, &c. and therefore the inhabitants of one city, borough, &c., are not prohibited

from selling woollen cloth, &c. by retail, in other cities, boroughs, &c., though not in open fair.¹

Among the class of sales regulated by statute, we may reckon the sale of a distress taken for rent, which is given by the statute of William and Mary, and must be made according to the directions of the statute, which enacts², “that where any goods shall be distrained for *rent* reserved (i), and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises, replevy the same; in such case, the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken, cause the goods so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable, shall swear to appraise the same truly, according to the best of their understanding), and after such appraisement, shall sell the same for the best price that can be gotten for them, for satisfaction of the rent, and charges of the distress, appraisement, and sale; leaving the over-plus (if any) with the sheriff, undersheriff, or constable, for the owner’s use.” And by a subsequent statute³, the goods distrained may be secured and sold upon the premises, in like manner, and under the like directions

¹ *Davis v. Leving*, 2 Lev. 89. *Lee v. White*, Dougl. 256.

² 2 W. & M. sess. 1. c. 5. § 2.

³ 11 G. 2. c. 19. § 10.

(i) This statute only extends to rents reserved upon lease or contract.

as under the 2 W. & M. But by the 9th section, if the distress is removed from the premises, "notice of the place where the goods and chattels so distrained shall be lodged, shall, within a week, be given to the tenant, or be left at his place of abode."

Upon those statutes the following points have been decided.

That it is not necessary in the notice of distress to set forth when the rent became due.¹

That the five days mentioned in the statute are inclusive of the day of sale.²

That though the act directs the notice to be left at the chief mansion-house, or other notorious place on the premises, yet personal service of the notice on the tenant of the premises is good; the intention of the act being that he should have notice, and that object being effected by such service more certainly than by the method pointed out.³

That the oath cannot be administered to the appraiser by a headborough, if a constable be present.⁴ (k)

Neither can the person distraining be sworn one of the appraisers; for the statute says, that he, with the sheriff, &c. shall *cause* the goods to be appraised, &c.⁵

As to the mode of selling a distress under a warrant from a justice of the peace; it is enacted by 27 Geo. II.

¹ *Moss v. Gallimore*, Dougl. 279.

⁴ *Broome v. Rice*, 2 Str. 873.

² *Wallace v. King*, 1 H. Black. 13.

⁵ *Andrews v. Russell*, B. N. P. 81.

³ *Walter v. Rumball*, 1 Ld. Raym. 53. 1 Salk. 247. 4 Mod. 389. S. C.

(k) Where the premises lay partly in one hundred and partly in another, and the goods are all impounded in one of them, the constable of that hundred is the proper officer to administer the oath for the appraisement of the whole distress. *Walter v. Rumball*, 1 Ld. Raym. 53.

c. 20. "That the justice granting the warrant of distress, shall therein order and direct, that the goods distrained shall be sold, within a certain limited time, not being less than four, or more than eight days; unless the penalty or sum of money distrained for, with the reasonable charges of the distress, be sooner paid. And after sale, the overplus (if any) is to be returned on demand to the owner of the goods distrained."

The requisites introduced by these statutes ought to be strictly pursued, in order to render the sale legal. At common law a distress could not be sold; but we have seen, that in certain cases a power to sell is given by statute; but such sale is to be made in a certain form. The requisites, therefore, of these statutes, are in the nature of conditions precedent to the distrainer's right to sell; and if not complied with, the sale is a tortious act and could not formerly, in any case, divest the property of the distrainer. But *now*, by statute 11 Geo. II. c. 19. § 19. it is provided, "That where any distress shall be made for any kind of *rent* justly due, and any irregularity shall be afterwards done by the party distraining, or his agent, *the distress shall not be deemed unlawful, nor the distrainer a trespasser ab initio*; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at his election. (*l*)

And by 17 Geo. III. c. 38. "Where any distress is made for money due for the relief of the poor, it shall

(*l*) By statute 57 Geo. III. c. 93., which regulates distresses taken for rent in arrear under the amount of twenty pounds, the charges are limited to the sums mentioned in the schedule to that act, and in case of any aggrievance, the parties may apply to a justice of the peace, who has power to award treble the amount of the goods taken, which may be recovered by warrant and distress.

not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of the overseers, or in the rate of assessments, or in the warrant of distress thereon; nor shall the party be deemed a trespasser *ab initio* on account of any irregularity which shall afterwards be done by him, but the party grieved may recover for the special damage," &c. The object of these statutes being to relieve the distrainer from the consequence of any *irregularity* in the proceedings, which formerly made him a trespasser *ab initio*, and consequently avoided any sale made under such tortious distress; and it would seem, that at present, any *irregularity* in the distress will not avoid a sale of the goods distrained, but the party grieved is left to his action for special damage under the statute. (m)

But the King may sell a distress for rent at common law¹, and consequently, as he is not named in the statute, his common right remains; and therefore, a sale under a distress taken for rent due to the Crown, need not be made in the form prescribed by the act of parliament.

To this head, of sales under the directions of particular statutes, may also be referred the conveyance of a bankrupt's property made by the commissioners to the assignees under the 13 Eliz. c. 7., 1 Jac. 1. c. 15., and the other bankrupt acts by which the commis-

¹ Com. Dig. tit. *Distress*. (D. 7.)

(m) And a party who purchases goods under a distress regularly conducted, has a sufficient title to maintain an action of trover against any person who may have a wrongful possession of them. *Lyon v. Weldon*, 2 Bing. 334.

Ch. 4.] SALES BY COMMISSIONERS OF BANKRUPTS. 307

sioners are empowered to assign all money, goods, chattels, wares, and merchandizes of the bankrupt, as well present as future; and by such assignment the property vests in the assignee, so that the bankrupt cannot afterwards recover or release the same; and notwithstanding part of the property assigned consists of *choses in action*, yet the assignee may sue for and recover the same in his own name.¹ (n)

¹ See the statutes referred to, and *v. Kell*, 2 Str. 1207. and *Hunter v. Ex parte Proudfoot*, 1 Atk. 253. *Potts*, 4 T. R. 182.
Evans v. Mann, Cowp. 569. *Ashley*

(n) The statutes 13 Eliz. c. 7. and 1 Jac. I. c. 15., as well as all the other bankrupt acts, are repealed by the statute 6 Geo. IV. c. 16., which instead thereof, enacts in section 68. "that the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have attained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have the like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt."

SECT. IV.

Sales by Auction.

Another very important part of the commercial law of this country, viz. sales by auction, may with propriety be placed here as a fourth section to this chapter. It has already been shown, what the law is upon the subject, so far as relates to the statute of frauds; in this place it is proposed to consider, 1st. What things are necessary to constitute a valid sale by auction; 2ndly. The rights and liabilities of the auctioneer and vendor; and 3dly. The rights and liabilities of the vendee.

In order to show what things have been considered necessary to constitute a valid sale by auction, and generally to point out the law regulating that species of sale, it may, perhaps, be the best plan, to give an outline of the points of the cases upon that subject.

1. Where several distinct lots are sold at the same auction, to the same person, each lot is a distinct contract; *Emmerson v. Heelis*, 2 Taunt. 38.; and the several purchases cannot be treated, or declared as one contract. *James v. Short*, 1 Stark. 426.

2. The printed conditions of sales by auction, are the terms of the contract between the seller and the buyer, and are in all cases binding on the parties; and they are sufficiently made known to the bidders, by being pasted up in the public sale-room, under the auctioneer's box. *Mesnard v. Aldridge*, 3 Esp. 271.

3. The verbal declarations of the auctioneer, although made at the time of sale, are not admissible as evidence

for the purpose of contradicting the printed conditions. *Gunnis v. Erhart*, 1 H. Black. 289.

4. Where the conditions of sale provide that any mistake in the particulars of the lots, shall not vitiate the contract, such stipulation does not extend to a wilful misdescription of the situation of the property, calculated to enhance its apparent value. *Norfolk (Duke of) v. Worthy*, 1 Camp. 340.

5. In candelstick biddings, where the several bidders do not know what others have offered, it would seem, that a bidding of 1 *per cent.* more than any other person has offered, would be binding. *Williams v. Steward*, 3 Mer. 483.

6. Where the plaintiff on the sale of a barge, addressed the company present, complaining of ill-usage from the owner, and that he had a claim against him; upon which no person bid, and after a single bidding by a friend, the barge was knocked down to the plaintiff; it was held, that under such circumstances there was no legal sale. *Fuller v. Abrahams*, 3 B. & B. 116.

What are the rights peculiar to the auctioneer, and the vendor of property sold by auction, may be collected from the following cases.

1. An auctioneer has a special property in goods sold by him, sufficient to maintain an action for the price, even though they were sold on the premises of the employer, and were known to be his property. *Williams v. Millington*, 1 H. Black. 81.

2. Where a deposit is paid to an auctioneer, it would seem that he is to be considered as a stakeholder, and not an agent between the parties, and that he is liable at all events till the contract is completed. *Edwards v. Hodding*, 5 Taunt. 815.

3. But the authority of the auctioneer as an agent, is put an end to by the completion of the sale, and nothing done by him afterwards relative to the subject-matter of it, will bind his principal. *Seton v. Slade*, 7 Ves. 276.

4. An auctioneer may sue the vendee for the price of goods sold to him, in his own name, although the name of the vendor was declared at the time of sale. *Atkyns v. Amber*, 2 Esp. 493.

5. And where he does not disclose the name of his principal *at the time of sale*, he may be called upon, not only to refund the deposit, but also to answer any damages which the purchaser may have sustained by the non-completion of the contract. *Hanson v. Roberdean*, Peake, 120.

6. And if he sell goods after notice that they do not belong to his principal, he is personally liable for the amount. *Hardacre v. Stewart*, 5 Esp. 103.

7. If a sale become nugatory by the auctioneer's negligence, he will not be entitled to any recompence for his services. *Denew v. Daverell*, 3 Camp. 451.

8. And where, from the want of the proper precautions, although no sale had in fact taken place, the auction duty was called for, and the auctioneer obliged to pay it, it was held, that he could not call upon his employer to repay him. *Capp v. Popham*, 6 East, 392.

9. An auctioneer cannot obtain a per centage which exceeds a fair remuneration for his trouble, except upon the footing of a special agreement. *Maltby v. Christie*, 1 Esp. 340.

10. The clerks of auctioneers are not authorized in the absence of their masters to act as agents for their

masters' employers, unless they are empowered so to do, *Coles v. Trecothick*, 9 Ves. 243.

11. A person who sells by auction, may reserve to himself the right of bidding, or he may employ a person to bid for him, if he give notice of his intention to do so, otherwise the employment of puffers is a fraud upon *bona fide* bidders, and cannot be supported at law ; and the highest bidder in such case will not be obliged to complete the sale. *Howard v. Castle*, 6 T. R. 642.

12. But the owner of property may direct the auctioneer to put it up at a particular price, and the auctioneer will be bound to follow his directions. *Bezwel v. Christie*, Cowp. 395.

As to the rights and liabilities of the vendee at a sale by auction, it has been some time settled, that a bidder may retract his bidding at any time before the auctioneer's hammer is knocked down, inasmuch as the falling of the hammer is the notification by the auctioneer to the bidder that the price he has offered is accepted ; and consequently, until that time the contract remains open, having only been assented to by one of the parties. *Payne v. Cave*, 3 T. R. 148.

And where goods belonging to two persons were put up to sale by public auction at one of their houses, and entered at the excise office in that person's name, and stated in the catalogue to be his property ; and a purchaser of some of the property of both, not being informed of the fact, and holding an acceptance of the person at whose house they were sold, settled with him for the amount of the goods he had purchased ; it was held, that the payment was good, and that the auctioneer, having suffered the purchaser to take away the goods, without giving him notice not to pay the person at whose house they were sold, was precluded from recover-

And now by the 41st section of the statute 4 Geo. IV. c. 41., copies of the affidavits made to procure registry, or of the entries in the registry books, are sufficient evidence, without the production of the originals, or the testimony or attendance of the officer in whose custody they are, if such copies be proved to have been examined and to be correct; and the registering officers must allow, upon a reasonable request, all persons whomsoever to take copies or make extracts from the original affidavits, or entries in the register books.

There are also other articles the sale of which is regulated by statute, either as to the place of sale, or mode of selling. Of the first description, are woollen and linen-cloths; it being enacted by the 1 & 2 P. and M. c. 7. § 12., that no person living in the country, out of any city, borough, town-corporate, or market-town, "shall sell *by retail* any woollen-cloth, linen-cloth, haberdashery-ware, grocery-wares, mercery-wares, at or within any city, borough, town-corporate, or market-town, or within the suburbs or limits thereof (*except it be in open fairs*) upon pain of forfeiting for each offence the sum of six shillings and eight pence, and the whole wares so sold or offered to be sold." By the third section, this act is declared not to extend to sales "by wholesale in gross, and not by retail." And the fifth section provides, that the act shall not hinder a person from selling by retail or otherwise all manner of cloth, linen or woollen, *of his own making*, in any city, &c. as freely as he might before the making of that act.

The act speaks of persons living in the country, and out of *any* city, borough, &c. and therefore the inhabitants of *one* city, borough, &c., are not prohibited

from selling woollen cloth, &c. by retail, in other cities, boroughs, &c., though not in open fair.¹

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7. If a sale become nugatory by the auctioneer's negligence, he will not be entitled to any recompence for his services. *Denew v. Daverell*, 3 Camp. 451.

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ing the value of the goods of either party from the purchaser. *Coppin v. Walker*, 7 Taunt. 237. And if there had been no actual settlement, the purchaser would have been entitled to set off a debt due to him from the person at whose house the goods were sold. *Copping v. Craig*, 7 Taunt. 243.

CHAPTER V.

OF THE SUBJECT-MATTER OF THE CONTRACT.

It will not fail to occur to the reader, that much of the matter which would seem properly referable to this title, has been discussed in other parts of the work ; as in the instance of reclaimed animals, ships, &c. But as the generic distinction of such property as subjects of the contract under consideration arises, in the one case, from the nature of the vendor's interest, and in the other, from the form of the contract, it was thought proper to speak of them under the titles which profess to treat of those branches of the subject, and which give rise to such distinctions. The same observations will apply in other instances ; so that, in fact, there is little left to be enlarged upon in this chapter, where the thing sold is such as may legally be made the object of a sale. The present chapter will, therefore, be devoted to the consideration of those cases in which sales are considered illegal with respect to the subject-matter. This branch of our subject may be divided as follows : where the contract is

- 1st. *Contrary to sound Policy.*
- 2d. *Contrary to the principles of Morality.*
- 3d. *In contravention of those Statutes made for the Regulation of particular Trades.*

And here it may be observed, that by the law of England many contracts are adjudged illegal, though

not specifically so declared by any positive law ; as in the two first divisions of this chapter ; all contracts being void if made against the principles of sound policy or the principles of morality, for the law prohibits every thing which is *contra bonos mores*.¹

¹ Per Lord Mansfield, in *Jones v. Randall*, Cowp. 39.

SECT. I.

Of Sales contrary to public Policy.

The first subject which will be considered in this section, is that of buying and selling the current coin of the country for more than its denomination. Whether such contracts be or be not contrary to public policy, it is not our business here to examine ; it is sufficient for us to say, that they have been so considered by parliament, and declared to be “to the great hindrance of the common-wealth of this realm² :” and it was therefore enacted, “That if any person or persons exchange any coined gold, coined silver or money, giving, receiving, or paying any more in value, benefit, profit, or advantage for it, than the same is or shall be declared by the King’s Majesty’s proclamation to be current for, within this His Highness’s realm, and other his dominions, that then all the said coined gold, silver, and money so exchanged, and every part and parcel thereof shall be forfeited, and the parties so offending suffer imprisonment by the space of one whole year, and make fine at the King’s pleasure.” One De

¹ 5 & 6 Edw. VI. c. 19.

Yonge was indicted upon this statute for purchasing 52 guineas, at the rate in *Bank of England notes* of 22s. 6d. *per guinea*, and of which he was convicted; but on a motion in arrest of judgment, a question was raised, whether the facts proved amounted to an offence within the statute, and accordingly reserved for the opinion of the twelve judges. Lord Ellenborough delivered the opinion of himself and eight other judges who had heard the argument, that the defendant had not been guilty of any offence within the meaning of the act; and judgment was accordingly arrested.¹

It is also contrary to the policy of our laws to give effect to any contract whose object is to forestall the market, regrade, or ingross the article bought. (o) Forestalling the market is defined by the statute 5 & 6 Edw. VI. c. 14., to be the buying or contracting for any merchandize or victual coming in the way to market, or dissuading other persons from bringing their goods or provisions there; or persuading them to enhance the price when there; spreading rumours with intent to enhance the price of any article, &c.² Regrating is said to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the same place; and ingrossing is the getting into one's possession, or buying up large

¹ *Rex v. De Yonge*, 14 East, 402.

² *Rex v. Waddington*, 1 East, 142.

(o) The statute 5 & 6 Edw. VI. c. 14. is repealed by the statute 12 Geo. III. c. 71., because such restraints are stated to have a tendency to prevent free trade, and to discourage the growth and enhance the price of articles. And all informations, indictments, suits, or prosecutions under the statute of Edward, are void and of no effect.

quantities of corn or other dead victual, with intent to sell them again. — These are illegal at common law.¹ And therefore, where goods are bought or contracted to be bought for any of the purposes aforesaid, the contract is illegal and void, and no action can be supported for the non-performance of it. But though it is said in *Hadham's case* ², that it is unlawful to sell corn *in the sheaf*; and in a marginal note to that part of the Institute, that, “he is an ingrosser that buys (other than by grant or lease of land or title) any corn growing in the fields;” yet it would seem, that the purchase of a *standing crop* is not considered illegal, unless it appear to have been made with the design of selling it again.³ (*p*)

The next class of contracts which will be considered under this head, are such as originate in bribery at elections for members of parliament.

As it is of the utmost importance that the source of that stream of democratic influence which the constitution designed to temper the ardent beams of monarchical power, and fertilize those flowers of liberty which are the Briton's proudest boast, should be kept pure and unpolluted, it has ever been the object of the legislature to endeavour, under the severest penalties,

¹ 1 Hawke, P. C. c. 80. *Rex v. Maynard*, Cro. Car. 232. 3 Inst. 195. and *Rex v. Waddington*, 1 East, 167.

² 3 Inst. 197.

³ Per Mansfield C. J. in *Bristol v. Waddington*, 2 New R. 559.

(*p*) By statutes 12 Rich. II. c. 2. and 5 & 6 Edw. VI. c. 16., much extended by the statutes 49 Geo. III. c. 126. and 55 Geo. III. c. 54., the sale of the offices therein mentioned, and of the deputations thereof, is prohibited; and all agreements, covenants, bonds or assurances for any of such offices, or the deputations thereof, are void.

to exclude any possibility of undue influence from the minds of those who exercise the important privilege of electing representatives in parliament. That such endeavours have hitherto been unavailing, is but too true; and it is much to be feared, that the bulk of mankind will still continue to disregard their real, though more remote interest, when opposed to the present profit which corruption will ever hold out to them.

That branch of those legislative regulations alluded to, which more immediately relates to the subject in hand, is the statute 7 & 8 W. III. c. 4. by which it is enacted, that "no person &c. after the teste of the writ &c. shall, before his election, directly, or indirectly, give, present, or allow to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment; or shall at any time hereafter make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment to or for any such person or persons in particular, or to any such county, city, &c., or to or for the use, &c. of any such person, place, &c. in order to be elected to serve in parliament for such county, city, &c."

This statute, therefore, prohibiting a candidate from furnishing the voters with any provisions after the teste of the writ, any contract with a person to do that which the act forbids, is illegal, and no action can be maintained for the breach of it. As, if an innkeeper at the request of the candidate furnish the voters with refreshment; he cannot recover of the candidate, as appears by the following case:

The plaintiff was an innkeeper¹, and the defendants

¹ *Ribbans v. Crickett*, 1 B. & P. 264.

two of the candidates for the borough of Ipswich. The action was brought on a bill for provisions furnished to the voters of the borough at the request of the defendants, consisting of three descriptions of charges: viz., 1st. For provisions furnished before the *teste* of the writ; 2dly. For provisions furnished after the *teste* of the writ to voters resident in the borough; 3dly. For provisions furnished to voters not resident in the borough. The defendants paid into court sufficient to cover the charges of the first and last descriptions: the question then was, if the plaintiff could recover the charges of the second description, notwithstanding the 7 & 8 W. III. ? On the part of the plaintiff it was contended, that the words "*in order*," used at the end of the clause, must be construed to run through the whole clause, and that it did not appear that the provisions were furnished to the voters *in order* that the defendants might be elected. But the Court held, that the words "*in order, &c.*" related only to the latter part of the clause. And upon the principal question, Eyre C. J. said, "It seems to be the opinion of the whole Court, that if the defendants think proper to insist on their objection, they may do it with success. This action is apparently founded on a contract to disobey the law, being to provide entertainment for voters during an election. Then how shall an action be maintained on that which is a direct violation of public law? The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature, as appears by the preamble of 7 & 8 W. III. c. 14; how then can we enforce a contract to do that very thing which is so much reprobated by the act? I am perfectly aware of the difficulties that may arise from construing this act rigidly, but, perhaps still greater

will arise if it be not so construed. It is true that a voter who comes from a distance may have reason to complain if he is not provided with necessities; but it is also obvious, that if the candidate can supply him he may supply himself. If any exception is to be allowed for voters not resident, the whole mischief complained of in the act will necessarily follow. It will be impossible for the candidate to make a distinction between those voters who reside at a distance, and those who live within half a mile of the place of voting. The legislature has drawn a strict line which is not to be departed from: it says, that after the teste of the writ no meat or drink shall be given to the voters by the candidate; that being the case, this Court cannot give any assistance to the plaintiff consistently with the principles which have governed the Courts of justice at all times, and with the cases which have been this day cited.¹ Persons who engage in these kind of transactions must not bring their cases before a Court of law.”

In a subsequent case², where an action was brought for meat, drink, &c. supplied by the plaintiff's testator, a publican, to *non-resident* voters at the election of members of parliament for the city of Durham, by the desire of the defendant, who was one of the candidates; it was objected that this demand came within the treating act, 7 & 8 W. III. A distinction was endeavoured to be drawn between *resident* and *non-resident* voters which was over-ruled; and upon the authority of

¹ *Falkney v. Reynolds*, 4 Burr. 2069. *Petrie v. Hanny*, 3 T. R. 418. *Steers v. Lashley*, 6 T. R. 61. *Booth v. Hodgson*, 6 T. R. 405., and *Mitchael v. Cockburn*, 1 H. Black. 379., which

establish the principle that a demand arising out of an illegal transaction cannot be supported.

² *Lofthouse v. Wharton*, cited in 1 Camp. 560.

the preceding case, which was fully recognized, the plaintiff was nonsuited. (*q*)

So, the publication of a libel being an offence against the public peace, its tendency being to provoke the anger and resentment of the person libelled, by holding up to the hatred, contempt, or ridicule of the public¹, it is contrary to sound policy to give effect to contracts for the sale of such mischievous productions; accordingly it has been ruled, in a case which will be noticed in the next section², that no action lies for the value of prints and caricatures of a libellous nature.

It seems properly to belong to this section to notice the regulation of the 24 G. II. c. 40. respecting the sale of liquors in quantities under the value of twenty shillings, the act being in its nature a declaration that it is contrary to sound policy to afford the lower orders the means of obtaining credit for small quantities of liquor, which is a great encouragement to drunkenness and riot. The 12th section of that statute, therefore, enacts, "That no person or persons whatsoever shall be entitled unto or maintain any cause, action, or suit for, or recover either in law or equity, any sum or sums of money, debt or demands whatsoever, for or on account of any

¹ 1 Hawke, P. C. 193.

² *Fores v. Johnes*, 4 Esp. 97.

(*q*) A promise made by a friend of a bankrupt when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums of money which he was charged with having received and not accounted for, he would be accountable for and pay all such sums as it should appear that the bankrupt had received and never accounted for, is void, from its being contrary to the policy of the bankrupt laws. *Ncrot v. Wallace*, 3 T. R. 17.

spirituous liquors, unless such debt shall have been, and *bond fide* contracted at one time to the amount of twenty shillings or upwards, nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at any one time, and mentioned in such article or item, shall not amount to the full value of twenty shillings at least, and that without fraud or covin." (r)

But this act only applies where the liquors are sold to the consumer; and therefore where, in an action for the use and occupation of a part of a house, and for goods sold and delivered¹, it appeared that the plaintiff was a liquor-merchant, and that the defendant occupied one side of a house belonging to him, the other side being occupied by one Eaton, who sold liquor on the account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there were had from Eaton, as they were wanted. Many of the items in the bill for liquors were under twenty shillings. It was objected, that the act of parliament prevented the plaintiff from recovering those items; but Lord Kenyon, before whom the cause was tried, ruled otherwise; and he said, that he thought this case did not fall within the mischiefs intended to be remedied by this act of parliament, the intent of which was to prohibit the sale of such small quantities

¹ *Jackson v. Attrill*, Peake, 180. a.

(r) Where upon a statement of accounts arising out of cross demands, credit was given for the amount of spirits sold in quantities under the value of twenty shillings; it was held, in an action for the balance, that those items could not be disputed. *Dawson v. Remnant*, 6 Esp. 24.

to the consumer, to prevent the pernicious effects of dram-drinking, which had been found extremely injurious to the lower orders of society. In the present case, the liquors were not sold to the defendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade, and therefore, in his Lordship's opinion, not within the act of parliament. But his Lordship said he would take a note of the objection, and the defendant might move the Court if he thought proper. The reporter adds, that he believes the defendant did not move the Court. (s)

(s) A contract under the appearance of a sale of goods, but in reality merely a gambling speculation, where neither party intended to buy or sell, but to pay the difference of the market price on a particular day, like a time bargain in the stocks, is illegal, and void at the common law, and no action will lie upon it. *Hilberds v. Pet-spiere*, coram Abbott C. J. at the Guildhall sittings in October, 1822.

And a sale (by the owner) of the command of a ship in the East India Company's service, without the knowledge and against the bye-laws of the company, is illegal, and the contract of sale cannot be the foundation of an action. *Blachford v. Preston*, 8 T. R. 89.

SECT. II.

Of Contracts of Sale contrary to the Principles of Morality.

The law of England, it has been already said, prohibits every thing which is *contra bonos mores*; and, therefore, no contract which originates in an act con-

trary to the pure principles of morality, can be made the subject of complaint in the courts of justice. This will be seen from the case alluded to in the last section.¹

Assumpsit for goods sold and delivered. The plaintiff was a printseller in Piccadilly, and the action was brought to recover the value of a quantity of caricature prints sold by him to the defendant.

The order, as proved to have been given by the defendant to the plaintiff, was, "for *all* the caricature prints that had ever been published." Under this order the prints in question had been sent to the defendant's house in Wales. The defendant refused to receive them, on the ground that the collection contained several prints of *obscene and immoral subjects*, exclusive of several being duplicates. The plaintiff's counsel contended that the order was general and comprehensive, without any exception as to the subject; and that the plaintiff, therefore, having sent prints of every description, was entitled to be paid for them. Mr. Justice Lawrence, who tried the cause, said, that for prints whose objects are general satire, or ridicule of prevailing fashions or manners, he thought the plaintiff might recover; but he could not permit him to do so for such whose tendency was immoral or obscene, nor for such as were libels on individuals, and for which the plaintiff might have been criminally answerable. The cause was referred.

So, if articles of dress be sold to a woman of the town, for the purpose of enabling her to appear at public places, and with a view to payment out of the wages of her prostitution, the vendor cannot recover, for the maxim *ex turpi causâ non oritur actio* applies;

¹ *Fores v. Johns*, 4 Esp. 97.

but it is otherwise if the goods are not supplied with that view ; for then the vendor may recover the price, although he knew the way of life of the vendee. Thus, in *assumpsit* to recover the value of certain clothes¹, furnished by the plaintiff to the defendant, the defence was, that the defendant was a woman of the town, and that this was well known to the plaintiff; *and that the clothes in question were for the purpose of enabling the defendant to carry on her business of prostitution.* The evidence to bring home a knowledge of the defendant's way of life to the plaintiff was slight; and Lord Ellenborough said, it must not only be shown that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold her the clothes to enable her to carry it on; so that he might appear to have done something in furtherance of it. In that case, the contract was corrupt and illegal, and such as could not be enforced in a court of justice; but it was not to be considered of this description from the mere circumstance of the defendant being a prostitute, even within the plaintiff's knowledge.

This distinction between acts in *furtherance* of the immorality, and the mere *knowledge* of it, will be further illustrated by the following cases.

Assumpsit for the use and occupation of certain rooms belonging to the plaintiff.² It was proved that the defendant was a woman of the town; that the rooms had been let to her by the wife of the plaintiff, who, it was proved, managed the business of his house in letting the lodgings; that at the time of letting them she was informed of the defendant's mode of life, and consented that she should be at liberty to receive male

¹ *Bowry v. Bennett*, 1 Camp. 348.

² *Girardy v. Richardson*, 1 Esp. 13.

visitors for the purpose of prostitution. It was ruled that this action was not maintainable, and a verdict was found for the defendant.

So; where an action was brought against the defendant¹ for board and lodgings, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff, who kept a house of bad fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution, Lord Kenyon C. J. was of opinion, that such a demand could not be heard in a court of justice.

On the other hand, where, in an action to recover the amount of a bill for washing done for the defendant², it appeared that the articles washed consisted principally of expensive dresses, and that there were also some gentlemen's night-caps, the former of which a witness (the defendant's servant) swore were for the purpose of enabling the defendant to appear at public places, and that the latter were worn by those persons who slept with her mistress; it was also proved, that the plaintiff had full knowledge of the defendant's situation, and of the purposes to which the articles in question were applied. A verdict having been found for the plaintiff, it was moved to set it aside, and enter a nonsuit; and *Crisp v. Churchill*, E. 34 G. III. coram Eyre C. J. was cited, where, in an action for use and occupation of a lodging, it was set up that the defendant was an infant and a prostitute; the Chief Justice was of opinion that those circumstances were no bar to

¹ *Howard v. Hodges*, Middlesex sittings before Lord Kenyon C. J. 2d. December, 1796. Selw. N. P. 97.

² *Lloyd v. Johnson*, 1 B. & P. 340.

the action, as both an infant and a prostitute must have a lodging; but it being shown that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, he held that the action was not maintainable; — but nothing was taken by the motion, the Court holding that the plaintiff being employed generally to wash the defendant's linen, the use which the defendant made of it could not affect the contract.

It is unnecessary to multiply instances of contracts which have been held illegal on account of the taint of immorality. The cases which have been cited are sufficient to illustrate the general principle.

SECT. III.

Of Sales in Contravention of particular Statutes.

It is not proposed here to give a detailed account of the various cases in which the legislature has interfered to regulate the manufacture or sale of particular articles; such an enumeration would be quite unnecessary. It is sufficient for our present purpose to remark, that whenever any statute positively forbids the sale or manufacture of any article, except in the manner prescribed; or if it is apparent, from the whole scope of the statute, that such is the intention of it, no action can be maintained upon any contract for the sale of such article, unless the requisites of the statute have

been complied with. (1) The following case is an example of this rule.

By the statute 17 Geo. 3. c. 42. § 1., reciting, "that inconveniences had arisen to the public by frauds committed in lessening the size of bricks under their usual proportion, without any diminution of price; for remedy thereof, and for the common good and benefit of the subject," it was enacted, "that all the bricks which shall be made or burnt for sale in any part of England, shall, when burnt, be not less than eight inches and a half long, and not less than two inches and a half thick, and not less than four inches wide." And the 2d section gives a penalty of twenty shillings *per* thousand for breach of this regulation.

In an action for goods sold and delivered¹, to recover the value of between five and six thousand bricks, which the defendant had bought from the plaintiff, a brick-maker; it appeared in evidence, that the bricks in question had been seen by the plaintiff, and selected by him out of a large quantity, some of which had been rejected by him for other defects, but no notice had been taken of the size, and the bricks were afterwards received and used by the defendant. But Lord Ellenborough C. J. being of opinion that the making and selling of such bricks was a fraud upon the statute, nonsuited the plaintiff. It was moved to set aside the nonsuit, on the ground, that however the breach of this law might have been a reason for the defendant's rescinding

¹ *Law v. Hedger*, 11 East, 500. 2 Camp. 147. S. C.

(1) It was so laid down by Lord Chief Justice Holt, in the case of *Bartlett v. Vesior*, Carth. 292.

the contract and returning the bricks, when he discovered them to be under the statutable dimensions, yet, having accepted and actually converted them to his own use, the contract was executed, and the vendee was, at all events, liable to pay the actual value of the goods; that the legislature had not avoided the contract itself, but only subjected the brick-maker to a penalty. But the Court held that this was a fraud upon the buyer, which it was the policy of the act to protect him against, which could only be done by holding that the seller should not recover the value of the bricks so sold; and Grose J. said, the legislature has prohibited the general sale of bricks which are under size. Rule refused. (u)

So; by the game laws, 5 Ann. c. 14. and 28 Geo. II. c. 12., the sale of game is considered an offence, and punishable by severe penalties. By the former of these statutes (which is made perpetual by 9 Ann. c. 25.), "every higher, chapman, carrier, innkeeper, victualler, or alehouse-keeper, who shall have in his custody or

(u) By the statute 55 Geo. III. c. 187. § 6., "No churchwarden or overseer of the poor, either in his own name, or in the name of any other person, shall supply for his own profit, any goods, materials, or provisions for the use of any workhouse, or otherwise for the support or maintenance of the poor in any place for which he shall be appointed overseer, during the time he shall retain such appointment, nor shall be concerned directly or indirectly in supplying the same, or in any contract or contracts relating thereto, under the penalty of 100*l*." Under this statute it has been held, that an overseer who supplied coals directly for the use of the poor, was not liable to any penalty, unless he did it also with a view to his own profit. *Slingsby v. Barker*, 3 B. & C. 6. But that where a churchwarden, who was a farmer, had supplied corn and flour to the poor of his parish, he was liable to the penalties, although he supplied them as other individuals, and at fair market prices. *Pope v. Baskhouse*, 8 Taunt. 289.

possession any hare, pheasant, partridge, moor or heath-game, or grouse, or shall *buy, sell, or offer to sale*, any hare, &c. unless such game in the hands of such carrier be sent up by a person qualified to kill the game, shall, upon every such offence, be carried before one justice of the peace for the county, city, &c. where the offence is committed, and, being convicted upon view, or upon the oath of one or more credible witnesses, shall forfeit for every hare, &c. the sum of five pounds, &c." And by the 28 Geo. II. c. 12. "Persons qualified or not qualified, *selling, exposing, or offering to sale*, any hare, pheasant, partridge, moor, heath-game, or grouse, are, for every such offence, made liable to the same forfeitures and penalties as are inflicted by the statute of Ann. upon higlers, &c." — It being obviously the intention of the legislature, by these acts, to prevent the sale of game by any person, it follows, that if persons contract for the sale or purchase of game in the face of the law, such contract cannot be enforced by a Court of justice. (v)

But it would seem that it is no objection to the validity of a sale, that it is made contrary to an act of parliament, containing mere revenue regulations, which are protected by a specific penalty. (w)

(v) By the bankrupt act 6 Geo. IV. c. 16., it is provided in § 125, "that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration, or with intent to persuade such creditor to consent to or sign his certificate, shall be void, and the money thereby secured or agreed to be paid, shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give the act and the special matter in evidence."

(w) Sales made by persons in their ordinary calling on a Sunday, are avoided by the statute 29 Car. II. c. 7. But a sale of goods made

By statute 29 Geo. III. c. 68. for granting the duties on tobacco, it is enacted¹, "That every person who shall deal in tobacco, shall, before he shall deal therein, take out a licence;" which, by the 72d section, is to be renewed yearly, under a penalty of fifty pounds. The statute 30 Geo. III. c. 40. enacts, that no tobacco (except Spanish or Portuguese) shall be imported either wholly or in part manufactured, on pain of forfeiting all such tobacco, with the packages, and also the ship in which it was imported. And by statute 43 Geo. III. c. 184. § 4. prize tobacco is made subject to the regulations and forfeitures of the former acts. Upon these acts a question was raised; whether a sale of a parcel of prize manufactured tobacco, consigned by persons in Guernsey to their factor here, and regularly entered on importation, and afterwards sold by such factor, he not having entered himself at the excise-office as a dealer in tobacco, nor having taken out a licence, was legal? Upon which the Court held, that there being no clause in the acts making the contract of sale illegal, and it being, at most, but a breach of a mere revenue regulation, which was protected by a specific penalty, they were satisfied that no objection lay to an action for the recovery of the price of such tobacco. (x)

¹ *Johnson v. Hudson*, 11 East, 182.

on a Sunday, when it is not made in the exercise of the ordinary calling of the vendor or his agent, is not void by the common law or by the statute. *Drury v. Desfontaine*, 1 Taunt. 151.

(x) By statute 7 Geo. I. st. 1. c. 21. § 2. all contracts made by His Majesty's subjects for loading any ship in the service of foreigners, with a cargo to trade to the *East Indies* are declared void. Under this statute, it was held to be a good plea in bar to an action of debt on a bond, that it was given to secure the payment of the price of

Having thus shortly noticed the principal causes which render the contract of sale illegal, we will con-

goods agreed to be sold and delivered in *London*, by the plaintiff to the defendant, to be by the latter shipped to *Ostend*, and from thence re-shipped for the *East Indies*; and there to be trafficked with, clandestinely. *Lightfoot v. Tenant*, 1 B. & P. 551.

And again, in another case, where the plaintiff, who was a druggist, had, after the 42 Geo. III. c. 38., but before the 51 Geo. III. c. 87., sold and delivered drugs to the defendant, who was a brewer, knowing that they were to be used in the brewery; it was held that he could not recover the price of them in an action of assumpsit; upon the ground, that the knowledge that the drugs were intended to be used in the brewery, was an infraction of that clause in the 42 Geo. III. which prohibits the causing or procuring any ingredients to be used except malt and hops. *Langton v. Hughes*, 1 M. & S. 593.

The statute 7 Geo. II. c. 8. (made perpetual by 10 Geo. II. c. 8.), against stock-jobbing, does not extend to cases where the party agreeing to transfer is possessed of the stock; and therefore, where the plaintiff, being possessed of 3000*l.* 4*per cent.* stock, empowered the defendant to sell the same for his own benefit; in consideration of which, the defendant agreed to transfer at the next opening, the same amount into the plaintiff's name; it was held, that this was not a case prohibited by the statute, but that on failure of the defendant's engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer. *Sanders v. Kentish*, 8 T. R. 162. But it has been decided that jobbing in *options* is within the meaning of the statute. *Brown v. Turner*, 7 T. R. 630. And in estimating the damages, in an action for the breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day, if it has risen in the meantime; but the highest value as it stood at the time of trial, if there has been no offer made to replace it in the intermediate time, while the market was rising. *Shepherd v. Johnson*, 2 East, 211.

It has been held, that the loan of money arising from the sale of stock, on an agreement that the borrower shall replace the stock, with such interest as the same would have produced in the meantime, is neither usurious, though the actual interest would be more than five pounds *per cent.*, nor within the prohibition of the stock-jobbing act, unless the transaction be colourable, and a mere device to obtain more than the legal interest. *Maddock v. Ryndall*, 8 East, 304.

clude this chapter with the observation of Lord Mansfield, on the subject of illegal and immoral contracts.

"The objection," (says the noble and learned Lord¹), "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but, it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*." (y)

¹ In *Holman v. Johnson*, Cowp. 345.

And a wager respecting the profits of a lottery contract, has also been decided not to be within the act. *Mortimer v. Salkeld*, 4 Camp. 42.

In a very recent case it was decided upon this statute, that the words "public or joint stock" related merely to the stock of this country, and that, therefore, a trafficking in Columbian bonds was not void by the statute. *Henderson v. Bise*, 3 Stark. 156.

(y) But a person who sells goods, knowing that the purchaser intends to use them in an illegal trade, is nevertheless entitled to recover the price if he yield no other aid to the illegal transaction than

It seems that the mere affirmation of a matter of opinion at the time of the sale of any article, as inserting the name of an artist in a catalogue, as a painter of any particular picture, is not such a warranty as will subject the seller to an action, if it turn out he was mistaken.¹ (g)

¹ *Jewdine v. Slade*, 1 Esp. 572.

vendor, that they were of a merchantable quality. *Laing v. Fidgeon*, 6 Taunt. 108.

3. Upon a sale of provisions, the law implies a warranty that they are wholesome. *Keilw.* 91. 1 Stark. 384.

4. Upon a written contract for goods of a particular denomination, which the purchaser had no opportunity of inspecting, the law implies a warranty of a saleable article answering the description in the contract, but not that the goods shall correspond with a sample shown to the buyer, but not mentioned in the contract. *Gardiner v. Gray*, 4 Camp. 144.

5. A declaration on the sale of some seed, that it was good, and such as the seller could warrant, was held to be a sufficient warranty. *Button v. Corder*, 1 Moore, 109.

6. Where it is the custom of a particular trade, to declare on the sale of an article whether it be sea-damaged, a sale made without such a declaration, will be a warranty that it is not so. *Jones v. Bowden*, 4 Taunt. 487.

7. A description in the invoice or bill of parcels of goods, that they are of a particular description, amounts to a warranty that such is the case. *Bridge v. Wain*, 1 Stark. 504.

8. Where the plaintiffs had purchased a quantity of copper-sheathing for the express purpose of sheathing a vessel, and the price paid was that usually charged for that kind of article, but there was no express warranty; it was held, upon the copper becoming worn out in a much less time than it ought to have done, had it been of the proper quality for the purpose, that an action of deceit would lie against the defendants, the sellers. *Gray v. Cox*, 1 Carr. 184.

(g) And where a horse was sold as of the age stated in a written pedigree, and the seller at the time of the sale declared, that he knew nothing of the horse but what he had learned from the pedi-

CHAPTER VI.

OF WARRANTIES.

By the civil law¹ an implied warranty was annexed to every sale, in respect of the title of the vendor; and if goods sold by a person who had no title to them were taken from the vendee, and re-delivered to the proprietor by the sentence of the Judge, (which judicial recovery of that which another had acquired by purchase was called eviction,) the vendee had his remedy on the warranty. But with us, we may remember, a man may in certain cases acquire a property by purchasing from a person who had none; in which case the owner of the goods cannot recover them of the vendee, but is left to his remedy against the fraudulent vendor. But in any case where the vendee suffers by the insufficiency of his vendor's title, (as when he has sold the goods *as his own*,) he may recover a satisfaction from the vendor, although there may not have been any express warranty²; and though it do not appear that the price has been paid³, or that the real owner has retaken his goods, or that the vendee has suffered any actual damage; for the fraudulent representation by the vendor that the goods were his own, when he knew them to be the property of a stranger, is the cause,

¹ Ff. lib. 21. tit. 2. 1.

² 1 Roll's Abr. 90. tit. Action sur

case, (P.) 5. *Cross v. Gardner*, 1 Show. 68. 3 Mod. 261. Carth. 90. S. C.

³ 1 H. 7. 21. 6.

of action¹; (z) and, therefore, when the vendor has not affirmed the goods to be his, nor expressly warranted them, the vendee is without remedy, for the common law will not imply a warranty; and in such case the maxim is *caveat emptor*.² So, also, as to the goodness of the article sold; the vendor is not bound to answer, unless he expressly warrant it to be sound and good³, or unless he *knew* it to be otherwise, and had used any art to disguise the defect⁴; or it turn out to be different from what the vendor represented it to be, upon the faith of which representation it was bought by the vendee.⁵ (α) But, in all cases of warranty by law, it is absolutely necessary to aver and prove that the

¹ *Furnis v. Leicester*, Cro. Jac. 474.

² Co. Lit. 102. a. Noy's Max. c. 42.

³ 1 Roll. Abr. p. 90. *Action sur case*, (P.) 4.

⁴ 1 Roll. Abr. p. 90. (P.) 3. *Kitch. 174. a. Chandelor v. Lopes*, Cro. Jac. 4.

⁵ Per Popham J. in *Andrew v. Boughey*, Dyer, 75. *Southern v. How*, Cro. Jac. 469. Roll. Abr. 91. tit. *Action sur case*. (P.) 7. 8.

(z) In the case of *Medina v. Stoughton*, 1 Salk. 210., there is a dictum of Lord Holt's, that where the seller of a personal chattel is out of possession, the bare affirmation that it is his, is not sufficient to charge him, without an express warranty, for the mere circumstance of his being out of possession affords reason to suspect his title. But this distinction is not mentioned in the report of the case in *Ld. Raym. 593*. And the reader may be referred to the observation of Buller J. upon the subject, in the case of *Pasley v. Freeman*, 3 T. R. 57.

(α) For although Lord Kenyon once held at *Nisi Prius*, that the vendor of a ship sold "*with all faults*," was bound to disclose a latent defect known to himself, and which it was impossible for the vendee to discover, and that the vendor was therefore liable in an action for the breach of the warranty, *Mellish v. Mottoux*, Peake, 115.; yet in a subsequent case Lord Ellenborough held, that a vendor is not liable under such circumstances, unless it can be shown that he has used some artifice for the purpose of concealing the defect from the vendee. *Baglehole v. Walters*, 3 Camp. 154, 506.

And in such cases of fraudulent misrepresentation or concealment, the vendee may vacate the contract. *Schneider v. Heath*, 3 Camp. 506.

vendor *knew* of the defect, the deceit being the gist of the action.¹

But, though the vendor is not bound to answer for the goodness of the article sold, except in the cases mentioned, yet, if they be of a different quality from that ordered by the vendee, it is open to him to return the goods and rescind the contract.² And in this our law corresponds with the civil law (which considered any fraud or deceit, or any latent imperfection, sufficient to avoid the contract³;) but in such cases the vendee must return, or offer to return the goods to the vendor, immediately upon discovering that they do not answer the order; for otherwise he may be presumed to assent to their being of a good quality, and to acquiesce in the due performance of the contract on the part of the vendor.⁴ (b)

In all cases of express warranty, an action on the case, or assumpsit⁵, lies against the vendor, if the warranty prove false. (c) As, if a man sell cloth and warrant

¹ *Dale's case*, Cro. Eliz. 44. *Chandelor v. Lopus*, Cro. Jac. 4. *Springwell v. Allen*, Allyn, 91., and 2 East, 448. n. S. C. *Dowding v. Mortimer*, 2 East, 480. n.

² *Fisher v. Samuda*, 1 Camp. 193.

³ *Fulbeck's Par. dial.* 3. p. 14.

⁴ *Fisher v. Samuda*, *anté*.

⁵ Per Grose J. in *Pasly v. Freeman*, 3 T. R. 54.

(b) Upon this rule it has been decided, that upon the delivery of trade utensils, contracted for at a certain price, as of a certain quality, the vendee may reject them after a reasonable trial, upon giving notice to the vendor to remove them; but if they are not sent back, and no notice is given to take them away, the vendee must pay a *quantum valebant* for them. *Okell v. Smith*, 1 Stark. 107. And where a purchaser kept the goods six months, and sold a part of them, the Court held that the jury had rightly inferred that he knew of the inferiority of the article of which he then complained. *Prosser v. Hooper*, 1 Moore, 107.

(c) An action of deceit is maintainable although there was a collateral agreement to exchange the article sold if it was disliked. *Wallace v. Jarman*, 2 Stark. 162.

it to be of a particular length¹; that a horse is sound², or wool merchantable³; when the cloth is not of the length represented, the horse blind, or the wool full of moths; in all these cases an action lies; and that though the warranty be by parol⁴ (d), if the warranty be made upon the sale; but, if it be made after the sale it must be in writing, otherwise the vendee can have no action on the warranty⁵; for, if not made upon the sale, there is no consideration for a parol agreement; but it is in writing the consideration is not inquireable.⁶ Yet, if a man warrant a horse to be sound before sale, upon which another buys him, an action lies; for the warranty was the cause of the buying⁷; and so it seems if the warranty be before the price is paid.⁸ (e)

¹ F. N. B. 98. K.

² 1 Roll. Abr. 96. (z. l. 20.) 97. i. 12.)

³ Ibid. l. 40.

⁴ F. N. B. 98. K.

⁵ Ibid. and see *Linsay v. Selby*, 2 Ld. Raym. 1120. and the opinion of Pratt in an anonymous case, 1 Str.

414. *Andrew v. Boughy*, Dyer, 76. d. *Roswell v. Vaughan*, Cro. Jac. 197. *Pope v. Lewyns*, Cro. Jac. 630.

⁶ Plowd. 308. b. 309. a.

⁷ *Goldsmith v. Preston*, 1 Roll. Abr. 96. l. 5.

⁸ *Butterfield v. Burroughs*, 1 Salk. 211.

But on a warranty of prime singed bacon, it was held that evidence, was not admissible to prove a practice in the bacon trade, to receive bacon to a certain degree tainted as prime singed bacon; nor to prove a practice which precludes the purchaser from all remedy, if he does not discover and point out the defect by an early day. *Yates v. Pym*, 6 Taunt. 446.

(d) If there was no warranty, but a written contract, and a false representation, the action should not be in assumpsit but in case for the deceit. 4 Camp. 22.

(e) In a late case upon the warranty of a chain cable, it was held, that the plaintiff might recover not only the value of the cable but also of an anchor, which it was averred had been lost through the insufficiency of the cable, it being proved that the ship would have been endangered if the cable had not been slipped. *Borradaile v. Brunton*, 8 Taunt. 535.

But a warranty does not bind where it is apparently false, or the falsehood is known to the vendee; as if a man warrant a horse apparently blind to be sound¹; or cloth that is murrey to be blue, and the vendee see it²; for, in such case, if he be deceived it is his own fault, and the law will not give any remedy to a man for his own negligence.³ This distinction of nude warranties (as they are called in some of the books) bears a strong resemblance to the rule of the Roman law, which distinguished between a defect *latens* and *patens*; in the former case, the vendor was answerable upon the implied warranty which the law annexed to every sale; but if the defect was plain and visible the vendee bought it at his peril.⁴ And this rule was recognised by the late learned Master of the Rolls in the case of *Dyer v. Hargrave*⁵, where it is laid down, that a warranty is not binding where the defect is obvious: and His Honour exemplified this rule by the case of a horse with a visible defect; or a house without a roof or windows, the one warranted sound, and the other in perfect repair. (f)

¹ Kit. 174. a.

⁴ Ff. lib. 18. tit. 1. 43. 45.

² 11 Ed. 4. c. 6. b. Kit. 174. b.

⁵ 10 Ves. jun. 507. and see *Mellish*

³ *Bayley v. Merrel*, Cro. Jac. 387.

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³ Bulst. 94. S. C.

(f) As the doctrine of implied warranties is of great importance to the commercial world, the following cases may not be unacceptable.

1. Where a publican agreed with a brewer to take all his beer of him, it was held that the brewer warranted to supply him with beer of a fair merchantable quality. *Holcombe v. Hewson*, 2 Camp. 391.

2. Where goods were ordered of a manufacturer for exportation and the purchaser had no opportunity of seeing them before they were shipped, there was an implied undertaking on the part of the

It seems that the mere affirmation of a matter of opinion at the time of the sale of any article, as inserting the name of an artist in a catalogue, as a painter of any particular picture, is not such a warranty as will subject the seller to an action, if it turn out he was mistaken.¹ (g)

¹ *Jeadwine v. Slade*, 1 Esp. 572.

vendor, that they were of a merchantable quality. *Laing v. Fidgeon*, 6 Taunt. 108.

3. Upon a sale of provisions, the law implies a warranty that they are wholesome. *Keilw.* 91. 1 Stark. 384.

4. Upon a written contract for goods of a particular denomination, which the purchaser had no opportunity of inspecting, the law implies a warranty of a saleable article answering the description in the contract, but not that the goods shall correspond with a sample shown to the buyer, but not mentioned in the contract. *Gardiner v. Gray*, 4 Camp. 144.

5. A declaration on the sale of some seed, that it was good, and such as the seller could warrant, was held to be a sufficient warranty. *Button v. Corder*, 1 Moore, 109.

6. Where it is the custom of a particular trade, to declare on the sale of an article whether it be sea-damaged, a sale made without such a declaration, will be a warranty that it is not so. *Jones v. Bowden*, 4 Taunt. 487.

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(g) And where a horse was sold as of the age stated in a written pedigree, and the seller at the time of the sale declared, that he knew nothing of the horse but what he had learned from the pedi-

But the sale of goods by sample is such a warranty, that if the bulk do not accord with the sample, the purchaser is not bound to accept or pay for the goods on any terms (*h*); although no fraud was intended on the part of the vendor, and although there may exist a customary arrangement in a particular trade, under such circumstances (*i*): as where the defendant¹ purchased of the plaintiff by sample, at a public sale sixteen hogsheads of sugar; but on examining the sugars purchased, it was found that they by no means corresponded in colour with the samples, and, in the opinion of the brokers who saw them, they were less valuable by five or six shillings a hundred weight. The plaintiff

¹ *Hibbert v. Shee*, 1 Camp. 113.

gree, it was no warranty. *Dunlop v. Waugh*, Peake, 123. Although in another case, where a ship was advertised as a copper-fastened ship, to be sold "*with all faults*," and was accordingly sold; it was held, that those words meant faults which a ship might have consistently with that description of vessel, and that the ship not being what the trade called a copper-fastened ship at all, it was a breach of warranty. *Shepherd v. Kain*, 5 B. & A. 240.

(*h*) But a warranty will not be implied upon an exchange of goods; therefore, where a wine-merchant exchanged one sort of wine with a customer, for another which he had previously sold to him, the customer was held not to be liable for a deterioration of the returned wine, without proof either of an express warranty or of fraud. *La Neuville v. Nourse*, 3 Camp. 351. And a party who exchanged a watch for goods, falsely warranted to be silver, was not allowed to maintain trover for the watch without showing fraud. *Emanuel v. Dane*, 3 Camp. 299.

(*i*) Upon a purchase of wheat by sample, the buyer has a right to inspect the bulk independently of any usage of trade to that effect; and therefore it was held, upon a refusal by the seller to show it, that the buyer was entitled to rescind the contract. *Lorymer v. Smith*, 1 B. & C. 1.

nevertheless required that the defendant should take the sugars, on being allowed a compensation for the inferiority, insisting, that, according to the usage of the trade, where samples have been drawn without fraud and the bulk proves inferior, sworn brokers are to be called in to estimate the difference, and the vendor making an allowance to the purchaser must stand to the bargain. The defendant refused to accede to this, as he alleged that the sugars were unfit for the purpose for which he bought them. It appeared, that the sugars in question arrived in the West India Dock in the end of November, 1806; and in pursuance of the Dock Act, as they were landed samples were taken, which were the samples exhibited at the sale on the 9th of April following. From being exposed to the air during this long interval, they had become much whiter than when originally taken, or than fresh samples drawn on the 11th of April. It was proved, that the sample and the bulk were of equal grain, and likely to contain the same quantity of saccharine matter, so that at the time of the sale they would have been of equal value to the sugar-baker, but that for retail, much more depends upon the colour than quality. The act of parliament enables the importer of sugars at any time to obtain fresh samples, while the purchaser at a public sale has no means of knowing when the samples exhibited have been drawn.

LORD ELLENBOROUGH. — The question here is, whether the contract has been substantially performed : does the sugar accord with the sample exhibited at the sale? If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept a compensation for the dissimilarity. This is not a performance of the contract. And though there should prevail an habitual mode of arrangement between dealers in the

article, I have always a right to say, "Is this what I meant to purchase?" A spirit of candour and accommodation may lead to a compromise between the parties; but the legal mode of dealing is, that if an article agreed upon is not furnished, I may reject it, and keep my money in my pocket. It appears that with respect to sugars there will be a difference between the bulk and the sample, when the sample has been for some time exposed to the air; and if the party had full notice *when* the sample was drawn, he might be expected to calculate upon the difference; but all that is communicated at these sales is, that the sugars of which samples are produced lie in the Docks, and the bidders have a right to presume that the samples have been recently drawn. (*k*)

But if, under these circumstances, the sugars had been delivered and the money paid, no action could have been maintained to recover back the price; but the vendee must have sued upon the warranty that the bulk was equal to the sample.¹ And where a person purchases any article at a certain price, upon the faith of

¹ *Fortune v. Lingham*, 2 Camp. 416.

(*k*) Where the seller produces a sample and represents the bulk to be of equal quality, if it turn out to be of an inferior quality, an action for deceit will lie, though the sale-note does not refer to the sample. *Meyer v. Everth*, 4 Camp. 55. But if a representation be made before a sale, of the quality of the thing sold, with full opportunity to the purchaser to inspect the article, and to examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied; no action for deceit will lie against the vendor, on the ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not. *Pickering v. Dawson*, 4 Taunt. 779.

a specimen exhibited, and on delivery it is found to be inferior, the vendee cannot in an action for the price set up the inferiority of the article delivered as a defence (l); but he should return it, and rescind the contract.¹ (m)

Upon a sale of goods by sample, with a warranty that the bulk of the commodity answers such sample, the law does not raise an implied warranty that the commodity is merchantable, though a fair merchantable price be given; and therefore, if there be a latent defect then existing, unknown to the seller, and without fraud on his part, such seller is not answerable, though the goods turn out to be unmerchantable.² (n)

¹ *Grimaldi v. White*, 4 Esp. 95.

² *Parkinson v. Lee*, 2 East, 314.

(l) The vendee of a bowsprit, which at the time of purchase appeared to be sound, but afterwards turned out rotten, cannot set up badness of quality as a defence to an action for the price. *Bluett v. Osborne*, 1 Stark. 384.

And in another case, a soap-boiler who had used barilla sold to him, and warranted to be of a particular quality, for eight successive boilings without complaint, was not allowed to object to the quality in an action for the price. *Hopkins v. Appleby*, 1 Stark. 477.

(m) But if he neglect to return the goods, and keep them, and treat them as his own, by putting them up to sale, or exercising other acts of ownership over them, he cannot afterwards reject the contract. *Parker v. Palmer*, 4 B. & A. 387.

(n) But where sheep, which were apparently healthy and sound in every respect, were sold with a warranty of soundness, and two months afterwards a great part of them died, and it was the opinion of farmers and breeders that they had died of an hereditary disease called the *goggles*, which was was incapable of discovery until fatal; it was held, that although there was nothing to connect the disease with their previous condition, that it was an unsoundness existing at the time of the sale; the jury being of opinion that it existed in the constitution of the sheep at that time. *Joliff v. Bendell*, 1 R. & M. 136.

As in the remaining part of this chapter we shall frequently have to consider the law of warranty as applied to horses, it seems proper here to notice a very prevailing misconception as to warranties of this particular species of property. It was formerly the opinion, that a sound price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted it was found to be so loose and unsatisfactory a ground of decision, that Lord Mansfield rejected it, and said, there must either be an express warranty of soundness, or fraud in the seller, in order to maintain an action; but, notwithstanding this decision of the noble and learned Judge, many persons still purchase without warranty, relying on the old rule.

If a horse be sold with a warranty of soundness, and it turn out that the warranty is false, the vendee may return him, and rescind the contract¹; and in such case he will be entitled to recover back the price; or he may, if he please, keep the horse and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty^{2(o)}; but in the former case, the contract must be rescinded *in toto*, and the parties put in *statu quo*³: for if the contract remain open no action will

¹ Bracton, l. 2. c. 27. Glanvil, l. 10. c. 14.

² Per Lord Eldon C. J. in *Curtis v. Hanny*, 3 Esp. 83.

³ Per Lord Ellenborough in *Hunt v. Silk*, 5 East, 452.

(o) Where an agent had sold two horses, belonging to different persons, at an entire price to one purchaser, and had warranted both horses sound; it was held, that the buyer could not sever the contract, and support an action against one of the vendees for the unsoundness of his horse, because the contract for the purchase was entire. *Symonds v. Carr*, 1 Camp. 363.

lie to recover back the price, but the plaintiff must sue on the warranty¹; and, therefore, where, in an action for money had and received to recover back the price of a horse, which had been warranted sound by the defendant², it appeared that there was an express warranty of soundness on the original sale, and that shortly after the bargain had been made and the price paid, the plaintiff objected that the horse was a roarer and unsound, and tendered back the horse and demanded the money; the defendant admitted that he had made the warranty, but denied the unsoundness, and refused to take back the horse or return the money; but said, that *if the horse were unsound he would take it again, and return the money*. It was proved that the horse was unsound; but it was objected on the part of the defendant, that the action was misconceived, for that the question to be tried was the warranty, which could only be tried in a special action on the case. At the trial, it occurred to the learned Chief Justice, who tried the cause, that the defendant, by his promise to return the money and take back the horse if he were unsound, had placed himself in the situation of a stakeholder, and, therefore, that on proof that the horse was unsound, he was to be considered as holding the money for the use of the plaintiff. But in delivering the opinion of the Court on a motion for setting aside a verdict which had been found for the plaintiff, and entering a nonsuit, his Lordship said, that, upon further consideration, he was clearly satisfied that the promise did not discharge the original warranty, and that the party complaining of the breach of that warranty might still sue upon it. The second conversation was not to be considered as

¹ *Power v. Wells*, Cowp. 818.
Weston v. Downes, Dougl. 23.

² *Payne v. Whale*, 7 East, 274.

an abandonment of the original warranty, the performance of which the defendant still insisted upon, but rather as a declaration, that if the warranty were shown to be broken, he would do that which is usually done in such cases, take back the horse, and repay the money. Then when any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty. Nonsuit to be entered. (p)

In order to maintain an action on a warrantry, it is not necessary, either that the horse should have been returned or notice of the unsoundness given to the vendor. (q)

Action on the warranty of a mare¹, "*that she was sound, quiet, and free from vice and blemish.*"

The plaintiff had bought the mare in question of the defendant at Winnel fair, in March, 1787, for thirty guineas, the defendant then warranting her sound, &c. Soon after the sale, the plaintiff discovered that she was a roarer, had a thorough pin through the hock, and had a swelled hock from kicking; but he kept her three months after this discovery, during which time he gave

¹ *Fielder v. Starkin*, 1 H. Black. 17.

(p) A servant who is employed to sell a horse, has an implied incidental authority to give a warranty of soundness, such a warranty by the course of trade being now usual. *Alexander v. Gibson*, 2 Camp. 555. and see *Helyear v. Hawke*, 5 Esp. 72.

(q) But in order to entitle the buyer of a warranted horse, which proves unsound to recover the expenses of his keep, he must make an offer to return it to the seller before he brings the action. *Caswell v. Coare*, 2 Camp. 82. And the Court of Common Pleas reduced a verdict in which the keep had been included, contrary to the Chief Justice's direction. 1 Taunt. 566.

her physic, and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, the plaintiff kept her till October, 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound *a full twelvemonth before her death*. It appeared that the plaintiff and the defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. A verdict having been found for plaintiff for the full price of the mare, it was moved to set it aside and enter a nonsuit. Upon showing cause, the Court discharged the rule, and Lord Loughborough C. J. said, "Where there is an express warranty, the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been *at that time unsound*, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale will alter the nature of a contract originally false; neither is notice necessary to be given: though not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete; and if it is fraudulent on the part of the seller, he will be liable to the buyer in damages, *without either a return or notice*. If on account of a horse warranted

sound proving otherwise, the buyer should sell him again at a loss, an action might, perhaps, be maintained against the original seller, to recover the difference of the price." So, also, where a pair of horses were warranted to be five years old, when in fact they turned out to be only four; it was held, that the vendee not having rescinded the contract within a reasonable time he could only recover damages for the breach of the warranty.¹ (r)

But where a horse is sold with an express warranty by the seller, that he is sound, free from vice, &c. yet if that warranty be accompanied with an undertaking, on the part of the seller, to take the horse again and pay back the purchase-money, *if, on trial*, he shall be found to have any of the defects mentioned in the warranty; the buyer *must return the horse* as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation

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of the seller. And in such case the term "*trial*" means reasonable trial.¹

It is sometimes made a condition of the sale that the horse shall be returned within a limited time if the warranty prove untrue; in such case, it is necessary to return the horse within the time, or no action can be maintained on the warranty²; but this condition does not apply to defects not expressly mentioned in it.

Action on the warranty of a horse.³ The case was this: the horse was sold at a public auction, warranted six years old and sound; and one of the conditions of the sale at the auction was, that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. Ten days after the sale the plaintiff discovered that the horse in question was twelve years old, and then the defendant refused to receive him; and the plaintiff sold him. It was proved that the horse was twelve years old; but the jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and and gave a verdict for the defendant. A rule having been obtained to set aside the verdict, Lord Kenyon C. J. said, "There was no doubt but that the defendant ought to have taken the horse again." The question turns on the meaning of the condition of sale; and His Lordship was of opinion that it must be confined solely to the circumstance of *unsoundness*; and that there was good sense in making such a condition at public sales; because, notwithstanding all the care that can be taken, many accidents may happen to the horse

¹ *Adam v. Richards*, 2 H. Black. 573.

² *Mesnard v. Aldridge*, 3 Esp. 272.

³ *Buchanan v. Parnshaw*, 2 T. R.

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between the time of sale and the time when the horse may be returned, if no time were limited. But the circumstance of the age of the horse is not open to the same difficulty. The verdict was, therefore, against evidence; and the Court made the rule absolute. (s)

And such a condition being printed and pasted up under the auctioneer's box, where he declares that the conditions are as usual, is sufficient notice to purchasers.¹

But it would seem that a non-compliance with a warranty, is no answer to an action for the price of the goods, even if the vendee tendered back the goods, and the vendor refused to accept them; but the vendee is left to his action on the warranty: and, therefore, where in an action on a banker's check² for fifteen pounds, drawn by the defendant, of which the plaintiff was the holder, the defence was, that the check was given for the price of a horse bought by the defendant of one Dennis for thirteen guineas, under a warranty of soundness, and the difference of one pound seven shillings had been given by Dennis in money; the horse was, in fact, the plaintiff's horse, and Dennis was employed to sell merely as agent for the plaintiff. The horse was discovered to be clearly unsound; and the defendant, having found out who was the real seller, tendered the horse, with the sum of one pound seven shillings, to the plaintiff, who again sent it back to the

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Assumpsit for forty-five guineas, the price of a horse sold by the plaintiff to the defendant, who was an officer in the Life-Guards.² The horse had been warranted, and the defence was that the warranty was untrue, the horse having defective eyes when sold. It appeared that the defendant had been informed of this defect in the eyes the day after he bought the horse; that he, notwithstanding, kept him for near seven weeks before he returned him, in the course of which time, suspecting the horse had some defect in his feet, he blistered him; this produced the thrush and a considerable degree of lameness: it was, however, only a temporary lameness, and the horse recovered of it; and it was proved that the remedies applied to the leg and foot could not have affected the eyes. On this case being made out, Lord Eldon said, he thought the matter set

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(c) The objection to this sort of defence seems to be, that it is a surprise to the defendant, although this objection might, perhaps, be removed by notice; but, at all events, it will not apply when the plaintiff sues upon a *quantum valebat*, so that in such an action, non-compliance with a warranty is a good defence. *Basten v. Batter*, 7 East, 479. And even on the sale of a horse for a certain price with warranty, if the defendant have actually paid the worth of the horse, which proves unsound before the action brought, it seems that the plaintiff cannot recover more. *King v. Boston*, 7 East, 481. n.

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It should be observed, that a horse labouring under a temporary injury, such as having picked up a nail, which is capable of being speedily cured or removed, it is not for that an unsound horse ; and where a warranty is made that such a horse is sound, it is made

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The warranty upon the sale of goods, &c. is usually contained in the receipt for the price, which may be read in evidence to prove the warranty, without an agreement-stamp.² (w)

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(v) It is not enough to show that a horse is a roarer, as this may be merely a bad habit, or proceed from other causes unconnected with his general health and activity; but it must be proved that the roaring is symptomatic of disease or infirmity in the particular case. *Bassett v. Collis*, 2 Camp. 523. And if the roaring be proved to be a disorder of such a nature as to incommode a horse very much when pressed to his speed, it will be an unsoundness. *Onslow v. Eames*, 2 Stark. 81. And, indeed, any infirmity which renders a horse less fit for present use or convenience, although not of a permanent nature, and removed after an action brought, is an unsoundness. *Elton v. Brogden*, 4 Camp. 281. And a cough which is not of a temporary nature, is an unsoundness in a horse within the warranty, a knowledge of it will make no difference. *Shillitoe v. Claridge*, 2 Chit. 425.

But proof of an incipient crib-biting is not an unsoundness sufficient to maintain an action for the breach of a general warranty. *Breenenburgh v. Haycock*, Holt, 630. And in another case, where it appeared that the plaintiff after telling the defendant, that one of two horses which he was then about to sell him had a cold, and agreed to deliver both at the end of a fortnight, sound and free from blemish; and at the end of the fortnight the horses were delivered, the one with a cough, and the other with a swelled leg, a fault which was also apparent at the time of sale, and a verdict was found for the defendant in an action for the price; the Court refused to grant a new trial. *Liddard v. Kain*, 2 Bing. 183.

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CHAP. VII.

OF RESCINDING CONTRACTS OF SALE.

FROM the nature of the contract of sale, it is obvious, that when once entered into it cannot be rescinded by either of the contracting parties without the consent of the other; and to this purpose speaks Glanvil¹: after enumerating the different methods of contracting sales, he says, "*Sed in duobus prioribus*" (where part of the goods have been delivered, or part of the price paid,) "*nullo modo potest alteruter contrahentium solâ voluntate à contractu resilire, nisi ex aliquâ justâ et rationabili causâ; veluti si inter eos convenerit, ut liceat alterutri eorum inde se impune retrahere infra certum terminum; tunc enim licet utrique (sicut convenit) infra datum terminum à contractu impune recedere: quippe generaliter verum est, quod conventio legem vincit.*" But though this be the general rule of law, a distinction is found in the old books as to sales bound by earnest: in such case, the law appears to have been, that if the buyer repented of his bargain he was excused from fulfilling it, upon forfeiting to the vendor what he had given by way of earnest. But if the failure in completing the contract was on the part of the vendor, who had received the earnest, he was obliged to make restitution to the vendee twofold², — a rule which is evidently copied from the civil law.³ So also Glanvil lays down

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the law where the vendee makes default; but where the vendor would rescind the contract, he doubts whether he might do so without loss: his words are, "*Ubi vero solæ arrhæ datæ sunt, si emptor à contractû recedere voluerit, id ei cum arrharum amissione licebit. Si autem venditor recedere voluerit in tali casu, quæro utrum sine pœnâ id facere possit; quod non videtur, quia tunc videretur, in hoc melioris conditionis venditor quam emptor: quod si impune id fieri nequit, quam pœnam inde præstabit?*"¹ How this might have been in Glanvil's time, is, however, not of much consequence to us in the present day, as the distinction between goods bound by earnest and delivery seems to be quite antiquated; and the law now is, that where a sale has been legally contracted it cannot be rescinded but by the mutual consent of the contracting parties, or by virtue of an agreement in the original contract, empowering one or both of them so to do on the happening of a certain event, or otherwise. As, where the defendant had sold to the plaintiff a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it², paying three and sixpence *per diem* for the hire of it. The plaintiff had paid the price at the time of the contract, but his wife not approving of the chaise it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it. The hire of three shillings and sixpence *per diem* was tendered at the same time, which the defendant refused, as well as to return the money. — Under these circumstances, the Court held that the plaintiff was entitled to recover back the price of the chaise, there being a stipulation in the

¹ Glanvil, l. 10. c. 14.

² *Towers v. Emerson*, 1 T. R. 132.

contract that it was to be returned if not approved of. The moment, therefore, it was returned, the contract was at an end, and the defendant held the money against conscience, and without consideration. As to the defendant refusing to receive the chaise back, Mr. Justice Buller observed, "It is admitted, that if the defendant had actually accepted the chaise, the action would lie; but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him: he was bound to receive it, and, therefore, it is the same as if he had accepted it. The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or, by a subsequent assent by the defendant, the plaintiff is entitled to recover his whole money, and then an action for money had and received will lie." (a)

(a) But where a purchaser finds that the commodity is not according to his order, and is unfit for his purpose, he should return it immediately, or give notice to the vendor to take it back. *Fisher v. Sadamada*, 1 Camp. 190. And even where inferiority of quantity is set up as a defence to an action for the price of goods bought, an offer to return the article must be shown in evidence. *Groning v. Mendham*, 1 Stark. 257.

And an usage in the city of London, that where goods are sold by a broker to be paid for by bill, the seller retains the power of annulling the contract, if he doubt the credit of the purchaser, is reasonable

sound proving otherwise, the buyer should sell him again at a loss, an action might, perhaps, be maintained against the original seller, to recover the difference of the price." So, also, where a pair of horses were warranted to be five years old, when in fact they turned out to be only four; it was held, that the vendee not having rescinded the contract within a reasonable time he could only recover damages for the breach of the warranty.¹ (r)

But where a horse is sold with an express warranty by the seller, that he is sound, free from vice, &c. yet if that warranty be accompanied with an undertaking, on the part of the seller, to take the horse again and pay back the purchase-money, *if, on trial*, he shall be found to have any of the defects mentioned in the warranty; the buyer *must return the horse* as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation

¹ Dr. Compton's case, cited by Buller J. in *Towers v. Barrett*, 1 T.R. 156.

(r) Where the purchaser of a horse, which was warranted a thorough-broke horse for a gig, kept it two months without using it himself, although his friends used the horse in a gig, and it fully answered the warranty; and afterwards the purchaser used him on two occasions, when he kicked violently and overturned the gig, but it was admitted that he drove him unskilfully; three of the judges held that the warranty was complied with, and the other that as there had been a misrepresentation of the place he came from, the horse-dealer was not entitled to recover. Upon this case being carried up into the Court of Error, it was considered that such misrepresentation did not invalidate the sale if the horse answered the warranty; but that it was a reason against giving costs to the respondent; and the judgment was accordingly affirmed, but without costs to either party. *Geddes v. Pennington*, 5 Dow. 159.

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Action on the warranty of a horse.³ The case was this: the horse was sold at a public auction, warranted six years old and sound; and one of the conditions of the sale at the auction was, that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. Ten days after the sale the plaintiff discovered that the horse in question was twelve years old, and then the defendant refused to receive him; and the plaintiff sold him. It was proved that the horse was twelve years old; but the jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and and gave a verdict for the defendant. A rule having been obtained to set aside the verdict, Lord Kenyon C. J. said, "There was no doubt but that the defendant ought to have taken the horse again." The question turns on the meaning of the condition of sale; and His Lordship was of opinion that it must be confined solely to the circumstance of *unsoundness*; and that there was good sense in making such a condition at public sales; because, notwithstanding all the care that can be taken, many accidents may happen to the horse

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And such a condition being printed and pasted up under the auctioneer's box, where he declares that the conditions are as usual, is sufficient notice to purchasers.¹

But it would seem that a non-compliance with a warranty, is no answer to an action for the price of the goods, even if the vendee tendered back the goods, and the vendor refused to accept them; but the vendee is left to his action on the warranty: and, therefore, where in an action on a banker's check² for fifteen pounds, drawn by the defendant, of which the plaintiff was the holder, the defence was, that the check was given for the price of a horse bought by the defendant of one Dennis for thirteen guineas, under a warranty of soundness, and the difference of one pound seven shillings had been given by Dennis in money; the horse was, in fact, the plaintiff's horse, and Dennis was employed to sell merely as agent for the plaintiff. The horse was discovered to be clearly unsound; and the defendant, having found out who was the real seller, tendered the horse, with the sum of one pound seven shillings, to the plaintiff, who again sent it back to the

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Assumpsit for forty-five guineas, the price of a horse sold by the plaintiff to the defendant, who was an officer in the Life-Guards.² The horse had been warranted, and the defence was that the warranty was untrue, the horse having defective eyes when sold. It appeared that the defendant had been informed of this defect in the eyes the day after he bought the horse; that he, notwithstanding, kept him for near seven weeks before he returned him, in the course of which time, suspecting the horse had some defect in his feet, he blistered him; this produced the thrush and a considerable degree of lameness: it was, however, only a temporary lameness, and the horse recovered of it; and it was proved that the remedies applied to the leg and foot could not have affected the eyes. On this case being made out, Lord Eldon said, he thought the matter set

¹ See the opinion of Lord Kenyon in *Gillis v. Cormack*, cited in 7 East, 481.

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(e) The objection to this sort of defence seems to be, that it is a surprise to the defendant, although this objection might, perhaps, be removed by notice; but, at all events, it will not apply when the plaintiff sues upon a *quantum valebat*, so that in such an action, non-compliance with a warranty is a good defence. *Basten v. Batter*, 7 East, 479. And even on the sale of a horse for a certain price with warranty, if the defendant have actually paid the worth of the horse, which proves unsound before the action brought, it seems that the plaintiff cannot recover more. *King v. Boston*, 7 East, 481. n.

up by the defendant was no defence to the action. Instead of returning the horse immediately upon discovering his defects, the defendant doctored him : this produced a new disorder, which the horse had not when sold. The question was, Would the horse, when returned to the seller, be diminished in value by this doctoring? If he would, His Lordship said, he thought the defendant should pay the price, and bring his action against the seller for any defect in the warranty existing at the time of the sale. His Lordship added, if a person keep a warranted article for any length of time after discovering its defects, and when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, he thought the party could have no defence to an action for the price of the article, on the ground of non-compliance with the warranty, but must be left to his action on the warranty to recover the difference in the value of the article warranted, and its actual value when sold ; and he concluded with saying, that if the jury thought that if any future purchaser were to be told that the horse had been blistered and doctored, it would diminish his value in the estimation of such purchaser, they should find a verdict for the plaintiff, which they accordingly did. (u)

It should be observed, that a horse labouring under a temporary injury, such as having picked up a nail, which is capable of being speedily cured or removed, it is not for that an unsound horse ; and where a warranty is made that such a horse is sound, it is made

(u) Infancy will be an answer to an action on the warranty of the soundness of a horse. *Hewlett v. Haswell*, 4 Camp. 118.

without any view to such injury ; nor is a horse so circumstanced, an unsound horse within the meaning of the warranty.¹ (v)

The warranty upon the sale of goods, &c. is usually contained in the receipt for the price, which may be read in evidence to prove the warranty, without an agreement-stamp.² (w)

¹ *Garment v. Barry*, 2 Esp. 673.

² *Skrine v. Elmore*, 2 Camp. 407.

(v) It is not enough to show that a horse is a *roarer*, as this may be merely a bad habit, or proceed from other causes unconnected with his general health and activity ; but it must be proved that the roaring is symptomatic of disease or infirmity in the particular case. *Bassett v. Collis*, 2 Camp. 523. And if the roaring be proved to be a disorder of such a nature as to incommode a horse very much when pressed to his speed, it will be an unsoundness. *Onslow v. Eames*, 2 Stark. 81. And, indeed, any infirmity which renders a horse less fit for present use or convenience, although not of a permanent nature, and removed after an action brought, is an unsoundness. *Elton v. Brogden*, 4 Camp. 281. And a cough which is not of a temporary nature, is an unsoundness in a horse within the warranty, a knowledge of it will make no difference. *Shillitoe v. Claridge*, 2 Chit. 425.

But proof of an incipient *crib-biting* is not an unsoundness sufficient to maintain an action for the breach of a general warranty. *Brookenburgh v. Haycock*, Holt, 630. And in another case, where it appeared that the plaintiff after telling the defendant, that one of two horses which he was then about to sell him had a cold, and agreed to deliver both at the end of a fortnight, sound and free from blemish ; and at the end of the fortnight the horses were delivered, the one with a cough, and the other with a swelled leg, a fault which was also apparent at the time of sale, and a verdict was found for the defendant in an action for the price ; the Court refused to grant a new trial. *Liddard v. Kain*, 2 Bing. 183.

(w) It has been held, that proof of a horse being a good drawer will not satisfy a warranty, that he was a good drawer and would pull quietly in harness. *Coltherd v. Bracken*, 2 D. & R. 10. Although a warranty in these words, "To be sold a black gelding, five years old, has been constantly driven in the plough, warranted," only extends to a warranty of soundness. *Richardson v. Brown*, 1 Bing. 344.

CHAP. VII.

OF RESCINDING CONTRACTS OF SALE.

FROM the nature of the contract of sale, it is obvious, that when once entered into it cannot be rescinded by either of the contracting parties without the consent of the other; and to this purpose speaks Glanvil¹: after enumerating the different methods of contracting sales, he says, “*Sed in duobus prioribus*” (where part of the goods have been delivered, or part of the price paid,) “*nullo modo potest alteruter contrahentium solâ voluntate à contractu resilire, nisi ex aliquâ justâ et rationabili causâ; veluti si inter eos convenerit, ut liceat alterutri eorum inde se impune retrahere infra certum terminum; tunc enim licet utrique (sicut convenit) infra datum terminum à contractu impune recedere: quippe generaliter verum est, quod conventio legem vincit.*” But though this be the general rule of law, a distinction is found in the old books as to sales bound by earnest: in such case, the law appears to have been, that if the buyer repented of his bargain he was excused from fulfilling it, upon forfeiting to the vendor what he had given by way of earnest. But if the failure in completing the contract was on the part of the vendor, who had received the earnest, he was obliged to make restitution to the vendee twofold², — a rule which is evidently copied from the civil law.³ So also Glanvil lays down

¹ L. 10. c. 14.² Bracton, l. 2. c. 27.³ Inst. l. 3. tit. 24.

the law where the vendee makes default; but where the vendor would rescind the contract, he doubts whether he might do so without loss: his words are, "*Ubi vero solæ arrhæ datæ sunt, si emptor à contractu recedere voluerit, id ei cum arrharum amissione licebit. Si autem venditor recedere voluerit in tali casu, quæro utrum sine pænd id facere possit; quod non videtur, quia tunc videretur, in hoc melioris conditionis venditor quam emptor: quod si impune id fieri nequit, quam pœnam inde præstabit?*"¹ How this might have been in Glanvil's time, is, however, not of much consequence to us in the present day, as the distinction between goods bound by earnest and delivery seems to be quite antiquated; and the law now is, that where a sale has been legally contracted it cannot be rescinded but by the mutual consent of the contracting parties, or by virtue of an agreement in the original contract, empowering one or both of them so to do on the happening of a certain event, or otherwise. As, where the defendant had sold to the plaintiff a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it², paying three and sixpence *per diem* for the hire of it. The plaintiff had paid the price at the time of the contract, but his wife not approving of the chaise it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it. The hire of three shillings and sixpence *per diem* was tendered at the same time, which the defendant refused, as well as to return the money. — Under these circumstances, the Court held that the plaintiff was entitled to recover back the price of the chaise, there being a stipulation in the

¹ Glanvil. l. 10. c. 14. ² Toller v. Barratt, 1 T. R. 133.

contract that it was to be returned if not approved of. The moment, therefore, it was returned, the contract was at an end, and the defendant held the money against conscience, and without consideration. As to the defendant refusing to receive the chaise back, Mr. Justice Buller observed, "It is admitted, that if the defendant had actually accepted the chaise, the action would lie; but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him: he was bound to receive it, and, therefore, it is the same as if he had accepted it. The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or, by a subsequent assent by the defendant, the plaintiff is entitled to recover his whole money, and then an action for money had and received will lie." (a)

(a) But where a purchaser finds that the commodity is not according to his order, and is unfit for his purpose, he should return it immediately, or give notice to the vendor to take it back. *Fisher v. Samuda*, 1 Camp. 190. And even where inferiority of quantity is set up as a defence to an action for the price of goods bought, an offer to return the article must be shown in evidence. *Groning v. Mendham*, 1 Stark. 257.

And an usage in the city of London, that where goods are sold by a broker to be paid for by bill, the seller retains the power of annulling the contract, if he doubt the credit of the purchaser, is reasonable

sound proving otherwise, the buyer should sell him again at a loss, an action might, perhaps, be maintained against the original seller, to recover the difference of the price." So, also, where a pair of horses were warranted to be five years old, when in fact they turned out to be only four; it was held, that the vendee not having rescinded the contract within a reasonable time he could only recover damages for the breach of the warranty.¹ (r)

But where a horse is sold with an express warranty by the seller, that he is sound, free from vice, &c. yet if that warranty be accompanied with an undertaking, on the part of the seller, to take the horse again and pay back the purchase-money, *if, on trial*, he shall be found to have any of the defects mentioned in the warranty; the buyer *must return the horse* as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation

¹ Dr. Compton's case, cited by Buller J. in *Towers v. Barrett*, 1 T.R. 136.

(r) Where the purchaser of a horse, which was warranted a thorough-broke horse for a gig, kept it two months without using it himself, although his friends used the horse in a gig, and it fully answered the warranty; and afterwards the purchaser used him on two occasions, when he kicked violently and overturned the gig, but it was admitted that he drove him unskilfully; three of the judges held that the warranty was complied with, and the other that as there had been a misrepresentation of the place he came from, the horse-dealer was not entitled to recover. Upon this case being carried up into the Court of Error, it was considered that such misrepresentation did not invalidate the sale if the horse answered the warranty; but that it was a reason against giving costs to the respondent; and the judgment was accordingly affirmed, but without costs to either party. *Geddes v. Pennington*, 5 Dow. 159.

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It is sometimes made a condition of the sale that the horse shall be returned within a limited time if the warranty prove untrue ; in such case, it is necessary to return the horse within the time, or no action can be maintained on the warranty² ; but this condition does not apply to defects not expressly mentioned in it.

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¹ *Germent v. Barrs*, 2 Esp. 675.

² *Skrine v. Elmore*, 2 Camp. 407.

(v) It is not enough to show that a horse is a roarer, as this may be merely a bad habit, or proceed from other causes unconnected with his general health and activity; but it must be proved that the roaring is symptomatic of disease or infirmity in the particular case. *Bassett v. Collis*, 2 Camp. 523. And if the roaring be proved to be a disorder of such a nature as to incommode a horse very much when pressed to his speed, it will be an unsoundness. *Onslow v. Eames*, 2 Stark. 81. And, indeed, any infirmity which renders a horse less fit for present use or convenience, although not of a permanent nature, and removed after an action brought, is an unsoundness. *Elton v. Brogden*, 4 Camp. 281. And a cough which is not of a temporary nature, is an unsoundness in a horse within the warranty, a knowledge of it will make no difference. *Shillitoe v. Claridge*, 2 Chit. 425.

But proof of an incipient crib-biting is not an unsoundness sufficient to maintain an action for the breach of a general warranty. *Breenenburgh v. Haycock*, Holt, 630. And in another case, where it appeared that the plaintiff after telling the defendant, that one of two horses which he was then about to sell him had a cold, and agreed to deliver both at the end of a fortnight, sound and free from blemish; and at the end of the fortnight the horses were delivered, the one with a cough, and the other with a swelled leg, a fault which was also apparent at the time of sale, and a verdict was found for the defendant in an action for the price; the Court refused to grant a new trial. *Liddard v. Kain*, 2 Bing. 183.

(w) It has been held, that proof of a horse being a good drawer will not satisfy a warranty, that he was a good drawer and would pull quietly in harness. *Coltherd v. Panchen*, 2 D. & R. 10. Although a warranty in these words, "To be sold a black gelding, five years old, has been constantly driven in the plough, warranted," only extends to a warranty of soundness. *Richardson v. Brown*, 1 Bing. 344.

CHAP. VII.

OF RESCINDING CONTRACTS OF SALE.

FROM the nature of the contract of sale, it is obvious, that when once entered into it cannot be rescinded by either of the contracting parties without the consent of the other; and to this purpose speaks Glanvil¹: after enumerating the different methods of contracting sales, he says, "*Sed in duobus prioribus*" (where part of the goods have been delivered, or part of the price paid,) "*nullo modo potest alteruter contrahentium solâ voluntate à contractu resilire, nisi ex aliquâ justâ et rationabili causâ; veluti si inter eos convenerit, ut liceat alterutri eorum inde se impune retrahere infra certum terminum; tunc enim licet utrique (sicut convenit) infra datum terminum à contractu impune recedere: quippe generaliter verum est, quod conventio legem vincit.*" But though this be the general rule of law, a distinction is found in the old books as to sales bound by *earnest*: in such case, the law appears to have been, that if the buyer repented of his bargain he was excused from fulfilling it, upon forfeiting to the vendor what he had given by way of earnest. But if the failure in completing the contract was on the part of the vendor, who had received the earnest, he was obliged to make restitution to the vendee twofold², — a rule which is evidently copied from the civil law.³ So also Glanvil lays down

¹ L. 10. c. 14.
² Bracton, l. 2. c. 27.

³ Inst. l. 3. tit. 24.

the law where the vendee makes default; but where the vendor would rescind the contract, he doubts whether he might do so without loss: his words are, "*Ubi vero solæ arrhæ datæ sunt, si emptor à contractu recedere voluerit, id ei cum arrharum amissione licebit. Si autem venditor recedere voluerit in tali casu, quero utrum sine pœnâ id facere possit; quod non videtur, quia tunc videretur, in hoc melioris conditionis venditor quam emptor: quod si impune id fieri nequit, quam pœnâ inde præstabit?*"¹ How this might have been in Glanvil's time, is, however, not of much consequence to us in the present day, as the distinction between goods bound by earnest and delivery seems to be quite antiquated; and the law now is, that where a sale has been legally contracted it cannot be rescinded but by the mutual consent of the contracting parties, or by virtue of an agreement in the original contract, empowering one or both of them so to do on the happening of a certain event, or otherwise. As, where the defendant had sold to the plaintiff a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it², paying three and sixpence *per diem* for the hire of it. The plaintiff had paid the price at the time of the contract, but his wife not approving of the chaise it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it. The hire of three shillings and sixpence *per diem* was tendered at the same time, which the defendant refused, as well as to return the money. — Under these circumstances, the Court held that the plaintiff was entitled to recover back the price of the chaise, there being a stipulation in the

¹ Glanv. 1. 10. c. 14. ² *Comyns v. Darnley*, 1 T. R. 132.

contract that it was to be returned if not approved of. The moment, therefore, it was returned, the contract was at an end, and the defendant held the money against conscience, and without consideration. As to the defendant refusing to receive the chaise back, Mr. Justice Buller observed, "It is admitted, that if the defendant had actually accepted the chaise, the action would lie; but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him: he was bound to receive it, and, therefore, it is the same as if he had accepted it. The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or, by a subsequent assent by the defendant, the plaintiff is entitled to recover his whole money, and then an action for money had and received will lie." (a)

(a) But where a purchaser finds that the commodity is not according to his order, and is unfit for his purpose, he should return it immediately, or give notice to the vendor to take it back. *Fisher v. Samuda*, 1 Camp. 190. And even where inferiority of quantity is set up as a defence, an action for the price of goods bought, an offer to return the article must be shown in evidence. *Groning v. Mendham*, 1 Stark. 257.

And an usage in the city of London, that where goods are sold by a broker to be paid for by bill, the seller retains the power of annulling the contract, if he doubt the credit of the purchaser, is reasonable

So, where some act is to be done by each party, under an agreement of sale ; and the vendor by neglecting his part, prevents the vendee from carrying the contract into execution ; this is a just and reasonable cause for rescinding the contract :—The following case is an authority on this point.

Action for money had and received.¹ On the 6th of June, 1791, the defendant agreed to sell to the plaintiffs all his cord-wood, growing at Tredgodder, in Shropshire, at eleven shillings and sixpence *per cord*, ready cut. The wood was to be coaled and cleared from off the premises by Michaelmas, 1792, and the money was to be paid on the 1st of March, 1792. It also appeared that the custom was for the seller to cut off the boughs and trunks, and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut sixty cords, ten of which he corded, and the plaintiff re-corded half a cord, and measured the rest. On the 8th of March, 1792, the plaintiffs paid the defendant twenty guineas ; but the defendant neglecting to cord the rest of the wood, the plaintiffs brought this action to recover back the twenty guineas. The Court was clearly of opinion they were entitled to recover ; and Lord Kenyon said this was an entire contract ; and as, by the defendant's default, the plaintiffs could not perform what they had

¹ *Giles v. Edwards*, 7 T.R. 181.

and valid : but the rejection of the contract must be intimated as soon as the seller has had time to inquire into the solvency of the purchaser ; and five days taken for that purpose, appeared to the Court and jury to be too long a period. *Hodgson v. Davis*, 2 Camp. 530.

undertaken to do, they had a right to put an end to the whole contract, and recover back the money they had paid under it.

So, upon a bargain for the sale of goods, if the vendee do not come and pay for them, and take them away in reasonable time after request, the vendor may elect to consider the contract as rescinded, and resell the goods. ¹ (b)

But a contract cannot be rescinded by one party for the default of the other, unless both parties can be put *in statu quo*; and, therefore, where A. agreed², in consideration of ten pounds, to let a house to B., which A. was to repair and execute a lease of within ten days, but B. was to have immediate possession, and was to execute a counterpart of the lease, and pay the rent, B. took possession, and paid the ten pounds immediately, but A. neglected to execute the lease and make the repairs, beyond the period of ten days, notwithstanding which, B. still continued in possession; it was held, that B. could not, by quitting the house for the default of A., rescind the contract and recover back the ten pounds in an action for money had and received, but could only declare for a breach of the special contract. (c)

¹ *Langfort v. Tyler*, 1 Salk. 113.

² *Hunt v. Silk*, 5 East, 449.

(b) But in a late case, Lord Ellenborough over-ruled the case of *Langfort v. Tyler*, and held that the neglect of the buyer to take away the goods did not warrant the vendor in reselling, although it would give him a right to an action for warehouse-rent, or for not removing them, if he were prejudiced by the delay. *Greaves v. Ashlin*, 3 Camp. 426.

(c) But where on a contract for the sale of trees, to be paid for agreeably to certain conditions of sale, the purchaser took away part, but refused to comply with the conditions; it was held, that

It should be observed, that whenever a party seeks to recover back money paid on a contract which has been rescinded, the original contract must be proved, and that it has been abandoned¹; and in no case will a party be allowed to recover back money so paid, or to maintain any action in contravention of such agreement, unless the original contract has been completely rescinded.² Thus, in an action for the non-delivery of soil or breeze according to a contract entered into between the parties, and for which money had been paid by way of earnest, the plaintiff failed on the special count, on account of a variance. He then wanted to go into evidence on the count for money had and received, in order to recover back what had been paid by way of earnest. Sir James Mansfield C. J. said, he apprehended the rule to be, where a party declares upon a special contract, seeking to recover thereon, but fails in his right to do so altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done. As in the case of a plaintiff suing a defendant, as having built a house for him according to agreement; there if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done. In *Payne v. Bacomb*³, (cited at the bar,) His Lordship said, he supposed there

¹ *Walker v. Constable*, 1 B. & P.

³ *Cork v. Munstone*, 1 New R. 351.

² *Weston v. Downes*, Dougl. 23.

⁴ Dougl. 681.

he had thereby abandoned the entirety of the contract, and that the executors of the seller might recover for the value of the trees carried away. *Bragg v. Cole*, 6 Moore, 114.

was a special agreement by the defendant to pay a share of the expenses of the suit in the Exchequer, but that the agreement had not been strictly pursued by him, and consequently he recovered for the money actually laid out by him to the defendant's use, on evidence of his connection with the defendant in that suit, and the obligation of the latter to pay. That case, therefore, proceeded on the ground that there was *no special agreement still subsisting and in force between the plaintiff and defendant*, on which the former was entitled to recover. In this case, if the plaintiff were allowed to go into the evidence he offered, it would amount to saying that there was no evidence of a subsisting special agreement, where, in truth, there was such evidence.

Assumpsit for an attorney's bill.¹ The defence was that the plaintiff had been employed by the defendant under a written agreement, which was produced, and was in these words: "In consideration of Mr. Harcourt having appointed me his solicitor, and of the emolument which I shall receive from preparing his leases, I undertake to conduct such suits as he shall be concerned in without any charge, except the fees and disbursements actually out of pocket:" signed by Parker. Lord Ellenborough said, he was of opinion, that while this agreement subsisted, nothing could be recovered except the money out of pocket. Each party had distinct and collateral things to perform. If the plaintiff thought that Mr. Harcourt gave part of his business to other attorneys he should have put an end to the agreement, by giving notice to the defendant of his intention

¹ *Parker v. Harcourt*, 5 Esp. 249.

to do so; but, till that was done, he was bound by the agreement. (d)

(d) In sales by auction under the usual conditions, that the highest bidder shall be the purchaser, the contract is not complete until the hammer is knocked down, before which time a bidder may always retract his bidding. *Payne v. Cave*, 3 T. R. 148.

Also a material alteration of a sale-note, made after the sale by the broker, at the instance of the seller, and without the knowledge of the buyer, will so far vitiate the contract as to prevent the seller from suing upon it. *Powell v. Dyer*, 15 East, 29.

CHAP. VIII.

OF THE REMEDY FOR THE NON-PERFORMANCE OF THE
CONTRACT OF SALE.

IT is not the object of this chapter to treat at large of the various actions which arise out of the contract of sale: this branch of our subject has been so copiously treated of in the many able works on the law of *Nisi Prius* already before the public, and which are in every professional library, that the repetition would only swell this work to an unnecessary length. We will, therefore, content ourselves with shortly adverting to the most prominent of those cases, which are almost inseparately connected with the subject treated of in the foregoing chapters.

It will be recollected, that where the contract of sale is complete, the parties have mutual remedies, the one for the payment of the price, and the other for the delivery of the thing sold. In the former case, the remedy usually resorted to is an action of debt, or *assumpsit* (a), to recover the price, for goods sold and

(a) Every contract importeth in itself an assumption: for when one doth agree to pay money, or deliver a thing upon consideration, he doth as it were assume and promise to pay and deliver the same; and therefore when one selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof agreeth to pay so much money on the delivery, or after, in this case he may have an action of debt, or an action on the case upon the assumption. Noy's Max. c. 42.

delivered, or goods bargained and sold, as the case may be. In actions for goods sold and delivered, where the delivery has been to a third person, it frequently becomes a question, whether the goods were sold to the vendee as agent for such third person, or to the vendee on his own account, and delivered to the third person as his agent or servant. And such cases always depend upon a question of fact, to whom the credit was originally given upon the sale. But if the person for whose use the goods are furnished be liable at all, any promise by a third person to pay for them must be in writing, otherwise it is void under the statute of frauds¹; and, therefore, where a man gave a verbal order in these words, "You must supply my mother-in-law with bread, and I will see you paid," no action lay against him for the bread supplied.² So, if a tradesman deliver goods to A. at the request and on the credit of B., who says before the delivery, "I will be bound for the payment of the money as far as eight hundred or a thousand pounds," if it appear that the credit was given to A. as well as B., the promise is void, not being in writing; such undertaking of B. being merely a collateral promise.³ But where the goods have, in fact, been sold to A., and on his credit, though delivered to B., debt or assumpsit for goods sold and delivered may be maintained against A., the delivery to B. being in point of law a delivery to the vendee⁴ (b); though in such cases it is usual to state

¹ 29 Car. II. c. 3, § 4.

² *Anderson v. Hodgkins*, 1 H. Black.

³ *Matson v. Wharam*, 2 T. R. 80.

120.

and see *Thompson v. Bond*, 1 Camp.

⁴ *Ramsden v. Ambrose*, 1 Str. 127.

⁵ *and Janet v. Cooper*, Comp. 227.

(b) If a party once gives credit to one person, he cannot afterwards shift his claim so as to charge another; and it is for the jury

in the declaration that the goods were delivered to B. It should be observed, that where there is a collateral undertaking *in writing* to pay for goods sold to another, such undertaking must be sued upon in a special action of *assumpsit*, stating the particular circumstance of the promise, and not upon a general *indebitatus assumpsit* for goods sold and delivered to the defendant, or for goods sold to the defendant, and delivered to another at his request, or for goods sold and delivered to another at the defendant's request.¹ Where there has been no actual delivery of the goods, it is proper to declare for goods bargained and sold, omitting the delivery²; but if an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered.³ (c)

Indebitatus assumpsit will not lie on a special agreement while it continues executory, but when executed, it raises a sufficient consideration for a general *indebitatus assumpsit*⁴; and, therefore, where A. agreed to deliver to B.⁵ one hundred bags of hops at a certain

¹ Mr. Serjeant Williams's note upon *Forth v. Stanton*, 1 Saund. 211. q. b. n. and the cases there cited.

² *Chaplin v. Rogers*, 1 East, 184.

³ Per Buller J. in *Lickbarrow v. Mason*, 3 T. R. 75.

⁴ *Gordon v. Martin*, Fitzg. 502.

⁵ *Waddington v. Oliver*, 2 New R. 61. and see also *Mussen v. Price*, 4 East, 147. and *Dutton v. Solomonson*, 3 B. & P. 582.

to say to whom the credit was given. *Leggatt v. Read*, 1 Carr, 16. And where one of two chapel-wardens had ordered goods, it was held that they ~~need~~ not be joined, but that the one who gave the order was primarily liable. *Shaw v. Hislop*, 4 D. & R. 241.

If goods be sold, to be paid for partly in money and partly in goods, the vendor after receiving the goods cannot declare generally for the balance, but must sue on the special contract. *Palver v. West*, Holt, 178. But upon an agreement to barter goods for goods, the balance may be recovered in money. *Ingram v. Shaw*, 1 Stark. 185.

the law where the vendee makes default; but where the vendor would rescind the contract, he doubts whether he might do so without loss: his words are, "*Ubi vero solæ arrhæ datæ sunt, si emptor à contractu recedere voluerit, id ei cum arrharum amissione licebit. Si autem venditor recedere voluerit in tali casu, quæro utrum sine pœnâ id facere possit; quod non videtur, quia tunc videretur, in hoc melioris conditionis venditor quam emptor: quod si impune id fieri nequit, quam pœnâ inde præstabit?*"¹ How this might have been in Glanvil's time, is, however, not of much consequence to us in the present day, as the distinction between goods bound by earnest and delivery seems to be quite antiquated; and the law now is, that where a sale has been legally contracted it cannot be rescinded but by the mutual consent of the contracting parties, or by virtue of an agreement in the original contract, empowering one or both of them so to do on the happening of a certain event, or otherwise. As, where the defendant had sold to the plaintiff a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it², paying three and sixpence *per diem* for the hire of it. The plaintiff had paid the price at the time of the contract, but his wife not approving of the chaise it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it. The hire of three shillings and sixpence *per diem* was tendered at the same time, which the defendant refused, as well as to return the money.—Under these circumstances, the Court held that the plaintiff was entitled to recover back the price of the chaise, there being a stipulation in the

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¹ *Giles v. Edwards*, 1 T. R. 181.

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So, upon a bargain for the sale of goods, if the vendee do not come and pay for them, and take them away in reasonable time after request, the vendor may elect to consider the contract as rescinded, and resell the goods.¹ (b)

But a contract cannot be rescinded by one party for the default of the other, unless both parties can be put *in statu quo*; and, therefore, where A. agreed², in consideration of ten pounds, to let a house to B., which A. was to repair and execute a lease of within ten days, but B. was to have immediate possession, and was to execute a counterpart of the lease, and pay the rent, B. took possession, and paid the ten pounds immediately, but A. neglected to execute the lease and make the repairs, beyond the period of ten days, notwithstanding which, B. still continued in possession; it was held, that B. could not, by quitting the house for the default of A., rescind the contract and recover back the ten pounds in an action for money had and received, but could only declare for a breach of the special contract. (c)

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(b) But in a late case, Lord Ellenborough over-ruled the case of *Langfort v. Tyler*, and held that the neglect of the buyer to take away the goods did not warrant the vendor in reselling, although it would give him a right to an action for warehouse-rent, or for not removing them, if he were prejudiced by the delay. *Greaves v. Ashlin*, 3 Camp. 426.

(c) But where on a contract for the sale of trees, to be paid for agreeably to certain conditions of sale, the purchaser took away part, but refused to comply with the conditions; it was held, that

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price *per cwt.* by a certain time, and A. having delivered part within the time, commenced an action for the price of such part. It was held, that as the contract was entire, and could not be split, the action could not be supported until the whole quantity was delivered, or until the time for delivering the whole arrived. In such cases, where there is a special agreement which is not performed, as, for instance, an agreement on the part of a vendee to give a bill of exchange in payment of goods sold, the plaintiff should declare specially, and if he fail altogether in proving the special, he may then resort to the general *indebitatus* count; but if the plaintiff fail in the special count, on account of a variance between the agreement stated and that proved, or for any other cause, which shows that there exists a special agreement which affords a ground of action to the plaintiff, he will not be allowed to recover on the general count.¹ (d)

It should here be observed, that in an action by several partners for goods sold, if one of them join in the action, who at the time of the contract was not a partner, but who afterwards became such, and by agreement amongst the partners was to have a share in the profits from a time preceding the contract, the plaintiffs will be nonsuited: for such person not being a partner

¹ B. N. P. 136.

(d) Where the defendant agreed that he was to be considered as the purchaser of beer-casks, if he did not return them within a fortnight, it was held that the plaintiff could not maintain an action for goods sold and delivered; but ought to have declared on the special agreement. *Lyons v. Barnes*, 2 Stark, 89.

at the time of the contract, there was no contract with him.¹ (e)

In an action for goods sold and delivered, the delivery may be proved by a journeyman of the vendor without releasing him, if it have not been customary to pay such journeyman for the goods upon the delivery; but if that have been usual, it seems he is not a good witness without a release.² So, a contract between vendor and vendee may be proved by the broker who made it, and that though he be to have for himself whatever money he can procure beyond a stated sum.³ But a letter written by an agent or broker, by whom a contract for the sale of goods has been made, is not evidence, where such agent or broker can be called as a witness.⁴

And where an account for goods sold has been adjusted, and a bill of exchange given for the amount, it is not competent to the party giving such bill afterwards to rip up the account which has been so settled, and dispute the several items.⁵ (f)

¹ *Wilsford v. Wood*, 1 Esp. 182.

² *Adams v. Davis*, 5 Esp. 48.

³ *Benjamin v. Porteus*, 2 H. Black.

⁴ *Maesters v. Abraham*, 1 Esp. 375.

⁵ *Knor v. Whalley*, 1 Esp. 169.

(e) But where at the time of a sale there were two partners, one of whom had retired, and the plaintiff continued to carry on the business of both, it was held that the action was correctly brought in the name of the plaintiff alone. *Atkinson v. Laing*, 1 D. & R. 16.

(f) In assumpsit for non-delivering goods upon a given day according to contract, it was held that the damages should be calculated according to the price of the goods on, or about the day when they ought to have been delivered, and not as on the day when a writ of inquiry was executed. *Gainsford v. Carrall*, 2 B. & C. 624. And in another case, on a contract made on the 13th of September, for tallow which was to be delivered in all during the next December,

Thus much for the vendor's remedy for the non-performance of the contract: we will now, on the other hand, see what remedy the law has provided for the vendee.

We may recollect, that where a bargain for the sale of goods is complete, the property of the goods is in the vendee by the bargain; and, therefore, if upon a sale of goods the vendor refuse to deliver them, the vendee, upon tendering the stipulated payment, may maintain trover against the vendor; or, as is more usual, particularly in cases of special contracts, an action of assumpsit for the non-delivery; in which action the contract should be stated according to the fact and performance, or readiness to perform it by the plaintiff shown; and if the contract be to deliver goods on request, a special request must be stated¹: but in an action for the non-delivery of goods sold according to the contract, it is not necessary to allege an actual tender.

¹ *Back v. Owen*, 5 T.R. 409.

it was held that the vendee was entitled to recover in damages, for the non-performance of the contract, the difference between the contract price, and the price on the 31st of December, he having done nothing to put an end to the contract, nor ever agreed to rescind it. *Leigh v. Paterson*, 8 Taunt, 540.

Although in actions for the breach of engagements to replace stock on a given day it is not enough to take the value of the stock on that day, if it had risen in the mean time; but the highest value as it stood at the time of trial must be taken, if there has been no offer by the defendant in the intermediate time to replace it while the market was rising. *Shepherd v. Johnson*, 2 East, 211. Or as it was laid down in another case, either the price at the day when it ought to have been replaced, or the price at the day of trial, at the option of the plaintiff; but not it would seem the highest price at any intermediate day. *Mr Arthur v. Seaford* (Ld.), 2 Taunt. 257.

and refusal of the price; it is sufficient to aver that the vendee was always ready and willing to receive and pay for the goods. So, where goods have been delivered, but a warranty of their goodness, &c. made on the sale proves untrue, a special action of assumpsit on such warranty is the proper remedy², though it was formerly more usual to declare in case³; and if there be any doubt whether the vendor have a partner in the transaction, it is still *advisable* to declare in case, to avoid a plea in abatement.⁴ Where the action is brought upon an *express* warranty, the *scienter* need not be charged, or if charged, need not be proved.⁵ But it is otherwise where there has been no express warranty, and the action is brought for the *deceit*, in selling to the plaintiff an article unsound or unmerchantable to the vendor's knowledge; for in such case the *scienter* is the gist of the action, and, consequently, must be stated and proved.⁶ (g)

¹ *Waterhouse v. Skinner*, 2 B. & P. 447.

² *Stuarts v. Wilkins*, Dougl. 18.

³ *Williamson v. Allison*, 2 East, 451.

⁴ *Govett v. Rudridge*, 3 East, 62.

⁵ *Williamson v. Allison*, supra.

⁶ *Springwell v. Allen*, Ayley, 91. 2 East, 448. n. S. C.

(g) The insolvency of the plaintiff is a defence to an action for the non-delivery of goods purchased in pursuance of the contract of sale. *Reader v. Knatchbull*, 5 T. R. 218. n.

But it will be no defence to an action for the price of an article, that it does not correspond with the contract of sale, if it appear that the defendant has kept and used the article for a length of time before he returned it; and he will be bound to pay for it, although not according to the contract. *Milner v. Tucker*, 1 Carr. 15.

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THE END.

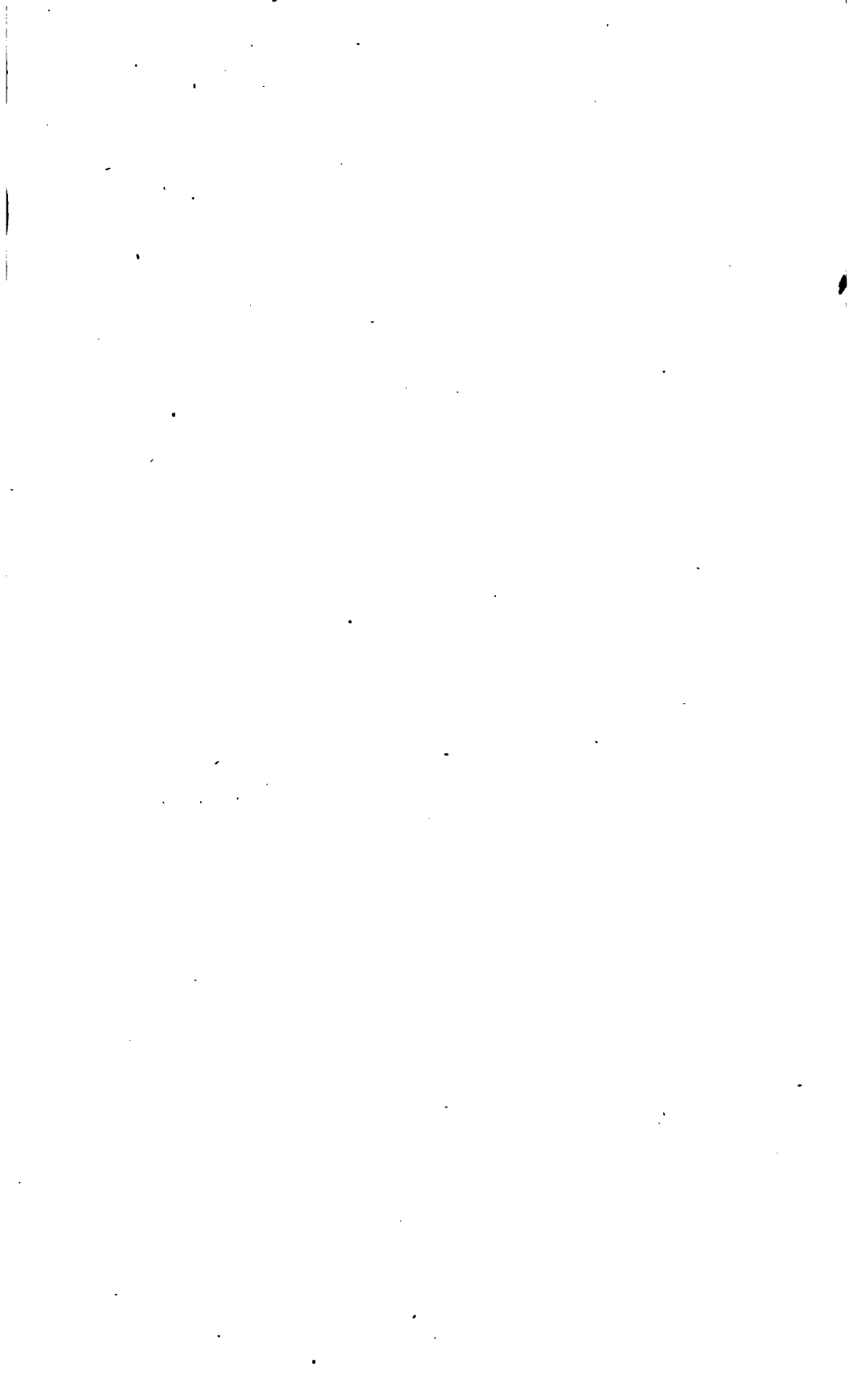
ERRATA.

- Page 96. In note *a*, at the end, for "2 B. & C." read "3 B. & C."
166. In reference 1. for "*Grattland*" read "*Gratland*."
286. Line 12. after "*proof*" insert "*of*."
— — 19. for "§ 16." read "c. 16."
309. — 9. for "*clandlestick*" read "*candlestick*."
327. In note *t*, for "*Vesior*" read "*Vinor*."
360. In reference 3. for "*Cork*" read "*Cook*."









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